Supreme Court, U.S.
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No.

IN THE

Supreme Court of the United States

STEVEN D. SANTHUFF, DIANA MENDEZ SANTHUFF,
PETITIONER

v.

STEVE SEITZ, IN HIS INDIVIDUAL CAPACITY

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Mr. and Mrs. Santhuff filed this 42 U.S.C. § 1983 suit in September 2005 against Respondent, Steve Seitz, a state of Georgia law enforcement officer (game warden), for illegal search and seizure that occurred prior to a warrant; for executing an illegal search warrant; and for false statements in violation of *Franks v. Delaware*, 438 U.S. 154 (1978).

Petitioners maintained a large collection of live freshwater turtles for hobby, private study and conservation. Mr. Santhuff, BS in zoology, was a registered "cooperating private individual" with the US Dept. of Interior, Fish and Wildlife Service working undercover with agents as a private citizen volunteer or unpaid law enforcement informant for over 10 years. Petitioners were never "dealers" and never sold any animals, wildlife, or turtles.

Months after the execution of a search warrant, the Respondent and a federal agent interviewed attorney Robert D'Agostino (formerly of the US Dept. of Justice, Reagan Era) a twenty-three year friend of Mr. Santhuff. Mr. D'Agostino informed the agents that several of the now protected turtle species that Mr. Santhuff lawfully owned, had originally belonged to him (D'Agostino). Even so, and despite a complete lack of criminal evidence, over 2 years after the search, Petitioner went to trial on 21 criminal charges and was acquitted in 2008.

In July 2010 Petitioners won a *Bivens* trial against two federal officers connected to this case for their pre-warrant search and seizure. In the Petitioners' case, separate from the *Bivens* Court, the District Court

ignored solid, irrefutable time card evidence (Appendix F, 69a-70a) that Respondent was with the federal agents on pre-warrant searches/seizures. The Appeals Court ignored this evidence without mention, based on the misapplication of the "Sham Affidavit" Doctrine to a third party witness, apparently regarding his deposition a "sham" as well.

The lower courts made no mention of the Rule 30(e) errata sheet (Appendix (G), 71a-73a) or other forms of evidence that supported that an irrelevant discrepancy of this witness was due to his confusion or being tricked during the questioning.

Franks v. Delaware, 438 U.S. 154 (1978) issues from the complaint were never resolved by either of the lower courts. The District Court shut down 5 years of litigation over testimonial discrepancy of a witness in having seen photos or not and issued sanctions against the Petitioners for all 5 years of litigation fees and costs amounting to $44,370.

The Appeals Court apparently accepted the *Franks* violation misrepresentations as true and valid because they found the Petitioner, Mr. Santhuff, to be a "turtle dealer" although no such evidence existed nor was any such claim presented in any other proceeding.

I. Do District and Appeals Courts violate [any] Plaintiff's Seventh Amendment and Due Process rights, stripping fact finding functions of the jury when the "Sham Affidavit" Doctrine is used to dispose of actions against the government or its agents by making judicial rulings of credibility of a non-party/disinterested witness while rejecting

testimony discrepancy explanations and ignoring Rule 30(e) errata sheets and other forms of corroborating evidence?

II. Can a Federal Appeals Court assume complete jurisdiction over all claims in an action when the District Court has entered a final order that does not dispose of nor even address all of the claims in the action?

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OPINIONS BELOW

The opinion of the Eleventh Circuit Court of Appeals is not published and was labeled as non-precedential: *Santhuff v. Seitz*, 1010 U.S. App. Lexis 13783 (11th Cir. July 6, 2010). See Appendix (A), 1a-18a.

The District Court Final Order prior to the Appeal is not published, case 1:05-CV-02517-WSD, in the Northern District of Georgia; Appendix (C) 23a-36a. The opinion of the District Court on Jan. 28 2009 that initially denied Respondent's summary judgment is found in Appendix (D) 37a-67a. The reconsideration order of the District Court on April 30 2009 granted summary judgment is found in Appendix (C) 23a-36a. The District Court issued order upon remand, on Sept. 16 2010, reversed sanctions against the attorneys and applied them in full to the Petitioners found in Appendix (B) 19a-22a.

The EN BANC petition for rehearing to the Eleventh Circuit Court of Appeals was denied on August 31, 2010. See Appendix (E) 68a.

JURISDICTION

The Eleventh Circuit entered judgment on July 6, 2010. The Eleventh Circuit denied petition for rehearing EN BANC on August 31, 2010. See Appendix (E) 68a This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

RELEVANT PROVISIONS INVOLVED

The Seventh Amendment to the United States Constitution provides, in relevant part:

> In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law.

United States Code, Title 42, Section 1983

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory of the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

The Fourth Amendment to the United States Constitution provides, in relevant part:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated***

> The Fourteenth Amendment to the United States Constitution provides, in relevant part:

> No State shall make or enforce any law which shall * * * deprive any person of life, liberty, or property, without due process of law * * *.

Fed. R. Civ. P., 56 (e)(1) provides in relevant part:

> The court may permit an affidavit to be supplemented or opposed by depositions, answers to interrogatories, or additional affidavits.

Fed. R. Civ. P., 30 (e)(1) provides in relevant part:

> The deponent must be allowed 30 days...to sign a statement listing the changes and the reasons for making them.

STATEMENT

This petition addresses a critical issue of federal law related to [any] Plaintiff's right to a trial by jury as guaranteed by the Seventh Amendment to the United States Constitution and matters of law related to Rule 56, Rule 30(e), sanctions and how the Seventh Amendment and these Federal Rules of Civil Procedure are violated by the misapplication of the Doctrine of the "Sham Affidavit."

The "Sham Affidavit" Doctrine can too easily be used to improperly deprive Plaintiffs of their Seventh Amendment and Due Process rights. The rationale of the Doctrine and its intended purpose is easily misunderstood or intentionally overlooked resulting in an extreme application because unlike in some state courts, See, e.g. *Kiser v. Caudill* 599 SE 2d 826, 215 (W.

Va. 2004), there are currently no judicial boundaries, federal rules or "bright line tests" guiding this Doctrine in federal courts.

This alleged or perceived inconsistency between an initial affidavit and a later deposition of non party witness, Mr. Lance Fisher, revolves around whether or not he was shown or viewed photographs of the Respondent. This issue is "non-inherent," and was fully explained such that the lower courts should have recognized the inconsistency as a credibility issue for a jury.

Supporting affidavits from the Petitioner and his attorney described that Mr. Fisher had actually viewed the photos just as his first and second affidavit's described and supported that the problem was only confusion by the deposition questioning. Mr. Fisher's third affidavit was only explanatory, an affidavit format of errata sheets also submitted in response to a "sham" claim. The courts criticized the multiple affidavits.

Mr. Fisher filled out timely errata sheets (Rule 30(e)), Appendix (G), 71a-73a, but the Respondent's motion for reconsideration of a denial of summary judgment was prematurely submitted before time elapsed on the reserved signature. The lower courts did not mention or give any weight to the errata sheets.

The time cards, Appendix (F), 69a-70a, described that Respondent was with the federal agents in an undercover capacity gathering evidence for a search warrant. The time sheets were submitted after Mr. Fisher made his first affidavit which later was declared a sham. In deciding to declare Mr. Fisher's affidavit a

"sham," the court was forced to ignore the evidence of the time sheets. The District Court does not mention them on reconsideration and the appeals did not mention them either despite the Petitioner specifically citing to them and relying on them to support his case.

Evidence should not have been ignored, see *Bushell v. Wackenhut Int'l, Inc.*, 731 F. Supp. 1574, 1578 (S.D. Fla. 1990). *Palazzo ex rel. Delmage v. Corio*, 232 F. 3d 38, 43-44 (2d Cir 2000). *Delany v. Deere & Co.*, 219 F.3d 1195, 1196 n.1 (10th Cir. 2000) Moore's Federal Practice § 56.14(1)(c) (Matthew Bender 3d ed. 2006).

In the same Federal District but a different Court (different Judge), Petitioners' Seventh Amendment rights were not violated in a related *Bivens* action against two Federal Agents. That case was allowed to proceed to a jury, resulting in a jury judgment of $88,500 awarded to Petitioners.

Petitioner Mr. Santhuff, as part of his work with the U.S. Fish and Wildlife Service in 2001/2002, suggested that the USFWS conduct an investigation which later became "Operation Snapper," a multi-state and federal investigation into the illegal commercialization of freshwater turtles. The agents eventually assigned to this case, after the agency fully developed Mr. Santhuff's ideas, decided to target Mr. Santhuff himself for his "possession" of his turtles. Mr. Santhuff had even known one of these agents (sued under *Bivens*) personally for the preceding 7 years. Respondent and a federal agent had convinced a Georgia court to issue a search and seizure warrant without informing the court of Mr. Santhuff's long term status with the USFWS and without informing the court that the only

undercover deals involving Mr. Santhuff were made at the government's request with federally issued cash and as a registered USFWS cooperating private individual or "CPI." In other words, the Respondent was successful in fraudulently convincing the Georgia court that Mr. Santhuff was a suspect in "Operation Snapper" in order to get a search and seizure warrant. All of Mr. Santhuff's turtles were then taken from him because, as the Respondent stated in his deposition, the "federal agents were needing some turtles." (Agents were buying and selling turtles undercover in "Operation Snapper.")

The Respondent executed a search warrant in July 2005 after joining federal agents in pre-warrant searches and seizures in the previous week. Appendix (F), 69a-70a. The Petitioner filed this 42 § 1983 in September 2005 and was later arrested November 28th 2005. This case was stayed until the Petitioner (Mr. Santhuff) resolved 21 criminal charges for which he was acquitted in 2008.

Consequently discovery lasted until September 2009 when the Petitioner was deposed and asked what evidence he had that the Respondent had actually accompanied federal agents during pre-warrant searches. Only after the Petitioner answered that he had no direct evidence and after the completion of the deposition, was Petitioner then given the Respondent's last-hour discovery packet of CD photo's plus an investigative report that for the first time revealed the true actions of the law enforcement officers involved, that they were disguised as county utility workers when they searched Petitioners residential property in their absence.

The discovery packet and photos on Compact Disc were reviewed by the Petitioner, counsel and witness Fisher all at the same time and place and all for the first time. Mr. Fisher recognized something in one of the photographs, a metal bucket carried by city utility workers (the Respondent) next to the Petitioners house the week prior to the search warrant.

In response to an affidavit from Mr. Fisher the Respondent argued facts not on record that Mr. Fisher had been shown who the respondent was in the photos and that it was not based on his personal knowledge. This argument of facts not on record required a second rebuttal affidavit from Mr. Fisher.

Following the second Affidavit from Mr. Fisher the Respondent took Mr. Fisher's deposition in which he stated he had not viewed any photographs of the agents, which appeared to contradict the first two affidavits. This triggered the Respondent's claim of a "sham affidavit" against this third party witness, in part by making comparison to the Petitioner's deposition statements, statements which were made before receiving the discovery reports and photos wherein the true facts in the case were revealed. The Respondent filed a premature motion for consideration before the timely errata sheets, Appendix (G), 71a-73a, had been submitted and before the witness's reserved signature on the deposition had expired.

"Portions of affidavits which are clearly inconsistent with prior deposition testimony are due to be stricken." *Rice v. Barnes*, 149. F. Supp. 2d 1297, 1300 (M.D. Ala. 2001).

"Deficiencies which have no bearing on the outcome of summary judgment need not be addressed..." *Id.* at 1113 *Thomas v. Alabama Council on Human Resources, Inc.*, 248 F. Supp. 2d 1105 (Dist. Court M.D. Ala.).

The relevant testimony from the deposition that Mr. Fisher actually observed the Respondent physically disguised as a city worker next to the Petitioners' residence was consistent and should not have been disregarded since there were 3 other pieces of evidence that the lower courts ignored without mention. Mr. Santhuff and his counsel, Mr. Stephen J. Wasley, submitted affidavits that supported that Mr. Fisher had merely been confused over seeing photos because they all saw them together for the first time while viewing images on a computer compact disc in Mr. Santhuff's home. The Respondent's own time cards, Appendix (F), 69a-70a, describe that the Respondent was actually in the company of the federal agents just as Mr. Fisher had claimed before those time cards were ever introduced to the record. This evidence should not have been ignored. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255, 106 S.Ct. 2505, 91 L.Ed.2d 2020 (1986).*Celotex Corp. v. Catrett, 477 U.S. 317 (1986). Kennett-Murray Corp. v. Bone*, 622 F.2d 887, 984 (5th Cir. 1980) . *Rollins v. TechSouth, Inc.*, 833 F.2d 1525, 1530 (11th Cir. 1987).

This constitutes a failure to evaluate the weight of the evidence all together and the usurpation of the function of the jury. *Celotex Corp. v. Catrett, 477 U.S. 317 (1986). Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255, 106 S.Ct. 2505, 91 L.Ed.2d 2020 (1986). *Choudhry v. Jenkins*, 559 F.2d 1095, 1090 (7th Cir.).

Hackman v. Valley Fair, 932 F.2d (3d Cir.1991). *Kennedy v. Allied Mut. Ins. Co.*, 952 F.2d 262, 266 (9th Cir. 1991). *Martin v. Merrell Dow Pharms Inc.*, 851 F.2d 703, 706 (3d Cir. 1988).

The alleged contradictions in this matter (viewing or seeing photographs) do not even rise to the level of substantive (see errata sheets of Mr. Fisher, Appendix (G) 71a-73a) and in this case the lower courts found that errata sheets did not even rise to any level of importance whatsoever as they ignored them, without mention, as if they had never even been part of the record.

"The Eleventh Circuit has not determined whether Rule 30(e) ever allows for substantive changes to deposition testimony through an errata sheet." *Delaware Valley Floral Group, Inc. v. Shaw Rose Nets, LLC*, 597 F. 3d 1374 (2010) *Id.* At 10. citing *Cultivos Yadran S.A. v. Rodriguez*, 258 F.R.D. 530, 532 (S.D. Fla. 2009).

Mr. Fisher was a third party and also a disinterested witness, so the "Sham Affidavit" rule does not apply. *Nelson v. City of Davis*, 2009 571 F.3d 924 (9th Cir. July 9, 2009). *Van Asdale v. International Game Technology*, ---F.3d ---, 2009 WL 2461906 (9th Cir. Aug. 13, 2009). *Reese v. Herbert* 527 F.3d (11th Cir 2008). *Lane v. Celotex Corp.*, 782 F.2d 1526 (11th Cir. 1986).

The Eleventh Circuit Court of Appeals assumed jurisdiction of the entire case despite the unresolved *Franks v. Delaware*, 438 U.S. 154 (1978) issues, Appendix (A) page 8a sec. II. The Appeals Court thereafter partially remanded the case back to the

District Court only on the issue sanctions against the attorneys where the District Court then modified its opinion and ruling that all of the Defendant's attorney fees and all costs to be charged to the Petitioners. The Petitioners were ordered to pay $44,370 for all of the attorney's fees associated with the five years of litigation, because of a third party having been confused and/or tricked about seeing photos.

The District Court engaged in credibility findings of third party disinterested witness, Mr. Fisher. However, the court took no particular notice that a total of 104 times the Respondent answered deposition questions with he "could not recall" or "could not remember."

Upon remand, Appendix (B) 19a-22a, the District Court admitted that the decision to dismiss the case was based on observing the withdrawal of Petitioners initial counsel, page 21 of Appendix B, and speculated his withdrawal was due to a credibility issue with Mr. Fisher. This was an application of an irrelevant event outside the case and the court should not have allowed itself to have been influenced by the separation of a client and his attorney. The Eleventh Circuit Appeals Court did not have the benefit of this admission by the District Court because it was post remand. And it was an admission related to issues already affirmed. Due to the timing of this admission by the District Court the record does not reflect the real reasons for the separation. The withdrawing attorney filed a brief in support of Mr. Fisher's credibility and in support of Petitioners' case that the lower courts ignored.

REASONS FOR GRANTING THE PETITION

This Court should find in the decision below that the use of the "Sham Affidavit" doctrine is contrary to unambiguous language of the Rules of Civil Procedure and contrary to a citizen's constitutional right to have their disputes tried before a jury where witnesses may testify and contradict previous statements they made under oath from which any party, if they so may use such inconsistent statements to impeach the testimony of the witness. Juries sort out witness credibility, not judges.

The decision below turns a blind eye toward this Court's prior findings in *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986) and *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255, 106 S.Ct. 2505, 91 L.Ed.2d 2020 (1986).

US Supreme Court Rule 10 A) Several aspects of this subsection are met as shown by the fact that Petitioners were given an opportunity in a related case to prove the merits of their case before a jury, winning the related *Bivens* trial in the same district (different Court, different Judge).

The Eleventh Circuit decision conflicts with all circuits and all previous Eleventh Circuit decisions and is also so far departed from the accepted and usual judicial proceedings involving the "Sham Affidavit" that it warrants a review from this Court.

US Supreme Court Rule 10 B) Several state courts handle the "Sham Affidavit" doctrine differently from one another and some state courts have a more

organized approach in their application of this rule as compared to a case by case approach in Federal appeals courts. See, *Kiser v. Caudill* 599 SE 2d 826, 215 (W. Va. 2004).

US Supreme Court Rule 10 C) The Eleventh Circuit Court of Appeals has violated the Petitioners Seventh Amendment and Due Process rights by making a credibility finding over an evidentiary matter, using a doctrine that has never been addressed by the US Supreme Court and Eleventh Circuit's decision, rationale, and approach in their misapplication of the "Sham Affidavit" doctrine in the Petitioners case was contrary to the holding of the US Supreme Court in *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255, 106 S.Ct. 2505, 91 L.Ed.2d 2020 (1986).*Celotex Corp. v. Catrett, 477 U.S. 317 (1986).*

I. Seventh Amendment and Due Process Rights are violated by this Eleventh Circuit ruling and misapplication of the "Sham Affidavit" Doctrine.

A court ruling on a motion for summary judgment must believe the evidence of the non-movant and must draw all justifiable inferences from the evidence in the non-moving party's favor. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255, 106 S.Ct. 2505, 91 L.Ed.2d 2020 (1986).

The District court's ruling and the Eleventh Circuit Appeals court's affirmation are contrary to existing law in that:

1. The affiant was a disinterested third-party and the Doctrine applies to the Party. See, *Reese v. Herbert* 527

F.3d (11th Cir 2008). *Perma Research & Development Co. v. Singer Co.*, 410 F.2d 572, 577-78 (2d Cir. 1969). *Nelson v. City of Davis*, 2009 571 F.3d 924 (9th Cir. July 9, 2009).

2. The deposition was also disregarded although the rationale of the Doctrine holds the deposition, as the basis of truth or accuracy, is not to be disregarded. See, *Jiminez v. All American Rathskeller, Inc.*, 503 F.3d 247, 253 (3d Cir. 2007) In re: *Citx Corp., Inc. v. Detweiller et. al.*448 F.3d 672 (3rd Cir. 2006). *Walker v. Wilmington* DE 360 Fed. Appendix. 305 (3rd Cir., DE 2010).

3. The alleged discrepancy was "non-inherent" or immaterial to a ruling on summary judgment. See, *Van T. Junkins & Assocs. v. U.S. Indus. Inc.*, 736 F.2d 656, 657-59 (11th Cir.1984). *Choudhry v. Jenkins*, 559 F. 2d 1085, 1090 (7th Cir. 1997). *Rollins v. TechSouth, Inc.*, 833 F.2d 1525, 1530 (11th Cir. 1987).

4. Supporting evidence was ignored without mention in both the District and Appeals Courts. See, *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255, 106 S.Ct. 2505, 91 L.Ed.2d 2020 (1986). *Delany v. Deere & Co.*, 219 F.3d 1195, 1196 n.1 (10th Cir. 2000). *Bushell v. Wackenhut Int'l, Inc.*, 731 F. Supp. 1574, 1578 (S.D. Fla. 1990). *Palazzo ex rel. Delmage v. Corio*, 232 F. 3d 38, 43-44 (2d Cir 2000). *Kennedy v. Allied Mut. Ins. Co.*, 952 F.2d 262, 266 (9th Cir. 1991). *Messick v. Horizon Indus.*, 62 F. 3d 1227, 1231 (9th Cir. 1995).

5. The deposition actually followed the affidavit, which is the reverse of typical applications of the Doctrine, potentially undermining the rationale for the

use of the Doctrine, as in this case where the deposition was disregarded rather than accepted as the true and accurate version of the different testimonial evidence. See, *Walker v. Wilmington* DE 360 Fed. Appendix. 305 (3rd Cir., DE 2010). In re*: Citx Corp., Inc. v. Detweiller et. al.*448 F.3d 672 (3rd Cir. 2006). *Kennedy v. Allied Mut. Ins. Co.*, 952 F.2d 262, 266 (9th Cir. 1991) *Kennett-Murray Corp. v. Bone*, 622 F.2d 887, 984 (5th Cir. 1980). In *Darnell v. Target Stores*, 16 F.3d 174, 176 (7th Cir.1994) the deposition followed the affidavit and there were third party affidavits. Even in this reverse example, similar to the Petitioners, the deposition was not disregarded.

6. The Rule 30(e) errata sheet was filed timely but was ignored without mention in both courts. Appendix (G) 71a-73a. In this case these errata sheets attempted to clarify and made corrections of ambiguity and confusion but were not corrections of inherent or essential testimony. See, *DeLoach v. Philip Morris Co* 206 F.R.D. 568, 570 (M.D.N.C. 2002). *Rios v. Bigler*, 847 F. Supp. 1538, 1540 (D. Kan. 1994) *Messick v. Horizon Indus.*, 62 F. 3d 1227, 1231 (9th Cir. 1995). *Tippens v. Celotex Corp.*, 805 F.2d 949, 954 (11th Cir. 1986) *North Trade United States, Inc. v. Guinness Bass Import Co. d/b/a Diago Guinness USA.* 2006 U.S. Dist. LEXIS 54435 (D. Ct. Conn. Aug 7, 2006)

7. The District Court never conducted an analysis of the *Franks* issues, and never ruled on the legality of the search warrant but the Appeals Court found in affirming the third party/disinterested witness' "sham affidavit" that no Constitutional violations had occurred. See, *Walker v. Wilmington* DE, 360 Fed. Appx. 305 (3rd Cir., 2010)

8. The District court improperly insinuated in its order, with no evidence on the record, that the Court observed the withdrawal of initial counsel was an indication of a credibility problem in the alleged "sham affidavit" witness. See the District Court's Order. Appendix. (B), page 21a.

Testimonial discrepancies can be explained. *Hackman v. Valley Fair*, 932 F.2d 239, 241 (3rd Cir 1991). Mr. Fisher explained his discrepancy. Appendix G, 71a-73a.

Merely because there is a discrepancy between deposition testimony and the deponent's later affidavit, a District Court is not required in all cases to disregard the affidavit. *Kennett-Murrary Corp. v. Bone*, 622 F .2d 887, 894 (5th Cir. 1980); see *Choudhry v. Jenkins*, 559 F. 2d 1085, 1090 (7th Cir. 1997).

In *Dewayne Walker v. Wilmington* DE 360 Fed. Appendix. 305 (3rd Cir., DE 2010), the Third Circuit reversed the District Court decision *Walker v. City of Wilmington* 579 F. Supp. 2d 563 2008, where just as in the Petitioners case, the court disregarded a deposition and stated:

> "We conclude that the District Court's application of this well established doctrine in this case results from a misunderstanding of the record and the rationale of the doctrine."

In the Petitioners' case, the complaint had not been fully resolved by the District Court's final ruling nor was it resolved by the Eleventh Circuit Appeals Court, specifically with respect to *Franks v. Delaware.*

Appendix (A), page 8a sec. II. In *Walker*, Third Circuit found that misrepresentations in the law enforcement search warrant affidavit could be found by a jury to be knowingly false or made in reckless disregard of the truth. If a jury so concluded, there is no question that the misrepresentation was material for purposes of a *Franks* analysis. See *Dewayne Walker v. Wilmington* DE 360 Fed. Appendix. 305 (3rd Cir., 2010)

Quoting: *Tippens v. Celotex Corp.*, 805 F.2d 949, 954 (11th Cir. 1986) at 953 as follows:

"Summary judgment is a lethal weapon, and court must be mindful of its aims and targets and beware of overkill in its use." *Burnswick Corp. v. Vineberg*, 370 F. 2d 605, 612 (5th Cir. 1967).

II. The Eleventh Circuit's Decision Cannot be Reconciled with this Court's Precedents.

A. The decision below fails to analyze Constitutional violations with Particularity and violates Fed. R. Civ.P., Rule 56, and sanctions.

As in the Petitioners' situation, judicial credibility decisions which result in the dismissal of actions violate the Seventh Amendment and Due Process rights. In disregarding an affidavit, a court must find some inherent inconsistency between the affidavit and deposition. *Rollins v. TechSouth, Inc.*, 833 F.2d 1525, 1530 (11th Cir. 1987).

The Eleventh Circuit stated that the inconsistency in the Petitioners' case was "inherent"

but was it really? If you remove that apparently inconsistent testimony (which was subsequently completely explained), strike it completely, the remaining testimony is still summary judgment defeating. It is completely consistent testimony in that the witness observed the Respondent with federal agents disguised as city workers. Furthermore, if you remove all other testimony and analysis on the inconsistent testimony, it adds nothing toward defeating summary judgment. Having seen photos is not inherent to this case, the Eleventh Circuit improperly concluded it was an "inherent" inconsistency. In light of the Respondent's own time cards, all of Mr. Fisher's testimony could have been disregarded, as it was, and summary judgment would have been defeated if the court had simply given any weight to the irrefutable statements made by the Respondent in his time cards. Appendix. (F), 69a-70a.

Quoting *Rollins v. TechSouth, Inc.*, 833 F.2d 1525, 1530 (11th Cir. 1987). The

> "district court, in granting TechSouth's motion for summary judgment, strayed from its proper role and made credibility determinations" and by doing so "inadvertently misapplied the standards articulated by the Supreme Court in *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986) and *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255, 106 S.Ct. 2505, 91 L.Ed.2d 2020 (1986).

"*Celotex* and *Anderson*, when viewed together, draw a fine but clear line, keeping the burden of proof on the nonmovant who ordinarily shoulders that burden at trial without diminishing the districts court's

obligation to view all the evidence in the light most favorable to the nonmoving party. See *Anderson*, 477 U.S. a---, 106 S.Ct. at 2511, 91 L.Ed.2d at 212 ([T]he judge's function is not himself to weigh the evidence and determine the truth of the matter but to determine whether there is a genuine issue for trial." *Rollins v. TechSouth, Inc.*, 833 F.2d 1525, 1530 (11th Cir. 1987).

The Eleventh Circuit declared it was bound by the Fifth Circuit decisions rendered before October 1, 1981 pursuant to *Bonner v. City of Prichard*, 661 F.2d 1206, 1207 (11th Cir. 1981). Consequently in *Rollins* the Eleventh Circuit ruled that district courts should follow:

> "if no inherent inconsistency exists, the general rule allowing an affidavit to create a genuine issue "even if it conflicts with earlier testimony in the party's deposition." *Kennett-Murray Corp. v. Bone*, 622 F.2d 887, 893 (5th Cir. 1980).

The sham affidavit rule is applied in limited circumstances, and, thus, "[e]very discrepancy contained in an affidavit does not justify a district court's refusal to give credence to such evidence." *Id.* (quoting *Tippens v. Celotex Corp.*, 805 F.2d 949, 954 (11th Cir. 1986); *see Tippens*, 805 F.2d at 953-54 ("To allow every failure of memory or variation in a witness's testimony to be disregarded as a sham would require far too much from lay witnesses and would deprive the trier of fact of the traditional opportunity to determine which point in time and with which words the witness ... was stating the truth."). "The [C]ourt must be careful to distinguish `between discrepancies which create transparent shams and discrepancies

which create an issue of credibility or go to the weight of the evidence.'" *Akins*, 278 F. App'x at 968 (quoting *Tippens*, 805 F.2d at 953).

Quoting *Reese v. Herbert* 527 F.3d (11th Cir 2008):

> "the district court erred by failing to review the full record on summary judgment and by failing to construe the facts and make all reasonable inferences and credibility choices in favor of the non moving part. That is "[e]ven though the 'facts,' as accepted at the summary judgment stage of the proceedings, may not be the 'actual' facts of the case, our analysis for purposes of summary judgment must begin with a description of the facts in the light most favorable to the plaintiff." *Davis v. Williams*, 451 F.3d 759, 763 (11th Cir. 2006).

There is tension in the use of Rule 30(e) errata sheets and the sham affidavit rule. The Seventh, Ninth and Tenth Circuits hold that on summary judgment, a substantive Rule 30(e) correction should be stricken, just like a sham affidavit. See, *Hambleton Bros. Lumber Co. v. Balkin Enters.*, 397 F .3d 1217, 1225 (9th Cir. 2005); *Burns vl. Bd of County Comm'rs*, 330 F.3d 1275, 1282 (10th Cir. 2003); *Thorn v. Sundstrand Aerospace Corp.*, 207 F.3d 383, 389 (7th Cir. 2000).

"The sham affidavit doctrine has created some disagreements among federal and state courts. The principal reason for these differences is that the Federal Rules do not address the handling of

contradictory affidavits in summary judgment proceedings. Rule 56 governs the limited circumstances under which summary judgment is appropriate. The plain language of Rule 56 permits consideration of affidavits in summary judgement proceedings. Fed. R. Civ. P. 56(e). Indeed, the original version of Rule 56 empowered courts to direct the appearance of affiant for examination, providing the court with an opportunity to question the affiant about contradictory testimony or affidavits. See Collin J. Cox, Note, Reconsidering the Sham Affidavit Doctrine, 50 Duke L.J. 261, 266 (2000).

In *Martin v. Merrell Dow Pharmeceuticals, Inc.*, 851 F.2d 703 (3rd Cir. 1998) the Third Circuit recogized that

> "there are situations in which sworn testimony can quite properly be corrected by a subsequent affidavit...[and] [w]here the witness was confused at the earlier deposition or for some other reason misspoke, the subsequent correcting or clarifying affidavit may be sufficient to create a material dispute of fact." *Id* at 705.

In *DeLoach v. Philip Morris Co* 206 F.R.D. 568, 570 (M.D.N.C. 2002) defendants motion to strike Plaintiff's Rule 30(e) deposition errata sheets was denied because the court explained that the changes neither contradicted the deposition testimony nor "add[ed] new facts to support asserted claims." See, Macchiaroli and Tarin. Rewriting the Record: A Federal Court Split on the Scope of Permissible Changes to a Deposition Transcript. Fed. Cts. L. Rev. 3:1 (2009).

Other courts have interpreted Rule 30(e) to permit all types of changes with no limitations on substance, materiality, or number of changes. The Connecticut District Court, see *North Trade United States, Inc. v. Guinness Bass Import Co., d/b/a Diago Guinness USA.* 2006 U.S. Dist. LEXIS 54435 (D.Ct. Conn. Aug 7, 2006) promoted a broad reading of Rule 30(e) that promotes accuracy and truthfulness without prejudicing the opposing party. See, Macchiaroli and Tarin. Rewriting the Record: A Federal Court Split on the Scope of Permissible Changes to a Deposition Transcript. Fed. Cts. L. Rev. 3:1 (2009).

"The rationale for allowing material changes to testimony is that the original answers to the deposition questions will remain part of the record and can be introduced at trial. Since the prior testimony is not removed from the record, the deponent may be cross-examined and impeached by any inconsistencies in his testimony. Under this approach, the finder of fact may make a determination as to the credibility of the deponent, thus reducing the risk that the record can be manipulated.

Under this rational, any unfairness to the opposing party in permitting the deponent to change its deposition without limit is balanced by keeping the original transcript in the record for impeachment or further clarification." *Northern Trade US. Id.*

The Court of Appeals for the Tenth Circuit held in *Delany v. Deere & Co.*, 219 F.3d 1195, 1196 n.1 (10th Cir. 2000), in which it stated that, " new evidence may furnish a good faith basis for the inconsistency."

Every discrepancy contained in an affidavit does not justify a district court's refusal to give credence to such evidence. See *Choudhry v. Jenkins*, 559 F.2d 1095, 1090 (7th Cir.).

Summary judgment was improper even though party's testimony was "not a paradigm of cogency or persuasiveness," since it was not a "transparent sham"), cert denied sub nom., *Indiana v. Choudhry*, 434 U.S. 997, 98 S.Ct. 634, 54 L.Ed.2d 491 (1977).

In light of the jury's role in resolving questions of credibility, a district court should not reject the content of an affidavit even if it is at odds with statements made in an early deposition." *Kennett-Murray Corp. v. Bone*, 622 F.2d 887, 984 (5th Cir. 1980).

In *Kennett* the Fifth Circuit found:

> "The affidavit preceded the discrediting deposition in the present case. While it is much less likely that an affidavit which precedes a weak deposition is filed as a transparent sham than is discrediting affidavit which is filed after a weak deposition which failed to establish a material issue of fact, we do not need to reach that conclusion today because we find that the affidavit and deposition are not inherently irreconcilable."

In *Van T. Junkins & Assocs. v. U.S. Indus. Inc.*, 736 F.2d (11th Cir.1984) where a deposition clearly stated an inherent material fact stating first there was no agreement in purchasing a building and a later affidavit stating there was an agreement to purchase a building

it was proper to disregard the later affidavit unlike in *Tippens v. Celotex Corp.*, 805 F.2d 949, 954 (11th Cir. 1986) the conflicting

> "statement is evidence that impeaches his memory, and impairs the probative weight of his testimony. Because assessing the credibility and weight of evidence are questions of fact for the trier of fact, the District Court's grant of summary judgment was improper. We therefore reverse the District Court's grant of summary judgment and remand for further proceedings in light of all the evidence in the record viewed in a light most favorable to the non-moving party."

Quoting *Van Asdale v. International Game Technology* 577 F. 3d 989 (9th Cir. 2009), The court said,

> "It must be recognized that the sham affidavit rule is in tension with the principle that a court's role in deciding a summary judgment motion is not to make credibility determinations or weight conflicting evidence. Aggressive invocation of the rule also threatens to ensnare parties who may have simply been confused during their deposition testimony and may encourage gamesmanship by opposing attorneys. We have thus recognized that the sham affidavit rule "should be applied with caution." *Sch. Dist. No. 1J v. ACandS, Inc.*, 5 F.3d 1255, 164 (9th Cir. 1993); see also *Nelson v. City of Davis*, 571 F. 3d 924 (9th Cir. 2009).

The "Sham Affidavit" rule

"does not automatically dispose of every case in which a contradictory affidavit is introduced to explain portions of earlier deposition testimony." *Kennedy v. Allied Mut. Ins. Co.*, 952 F.2d 262, 266 (9th Cir. 1991) at 266-267

"The non-moving, party is not precluded from elaborating upon, explaining or clarifying prior testimony elicited by opposing counsel on deposition [and] minor inconsistencies that result from an honest discrepancy, a mistake, or newly discovered evidence afford no basis for excluding an opposition affidavit." *Messick v. Horizon Indus.*, 62 F. 3d 1227, 1231 (9th Cir. 1995).

"The inherent inconsistency between Plaintiff's affidavit and his deposition testimony requires the improper portions of the affidavit to be STRICKEN." *Thomas v. Alabama Council on Human Relations, Inc.* 248 F. Supp. 2d (M.D. Ala. 2003)

In *Akins v. Fulton County, Georgia* 278 Fed. Appendix. 964. (11th Cir. 2008) reiterated district courts

"shall consider all evidence in the record when reviewing a motion for summary judgment-pleadings, depositions, interrogatories, affidavits, etc., and can only grant summary judgment if everything in the record demonstrates that no genuine issue of material fact exists" where it cited *Tippens v. Celotex Corp.*, 805 F.2d 949, 952 (11th Cir. 1986).

"[E]very discrepancy contained in an affidavit does not justify a district court's refusal to give credence to such evidence." *Tippens*, 805 F.2d at 954.

"In opposing summary judgment, the non-moving party may avail itself of all facts and justifiable inferences in the record taken as a whole." *Tippens v. Celotex Corp.*, 805 F.2d 949, 952 (11th Cir. 1986).

II. The Eleventh Circuit's Decision Cannot be Reconciled with this Court's Precedents.

B. The Circuits Are Split Over This Doctrine and The decision below violates every reported case regarding the "Sham Affidavit" Doctrine since its birth in *Perma Research & Development Co. v. Singer Co.*, 410 F.2d (2d Cir. 1969).

The Third Circuit Opinion in *Jiminez v. All American Rathskeller, Inc.*, 503 F.3d 247, 253 (3d Cir. 2007) provides the most comprehensive review of the "Sham Affidavit" doctrine that the Petitioners can find.

[The] district court must not resolve factual disputes by weighing conflicting evidence, see *Warrior Tombigbee Transportation Copany v. M/V NAN FUNG* 695 F.2d 1294, 1298 (11th Cir. 1983), since it is the province of the jury to assess the probative value of the evidence, see *Odum v. Celotex Corp*, 764 F.2d 1486, 1488 (11th Cir. 1985). The district court must not "assess the probative value of any evidence presented to it, for this would be an unwarranted extension of the summary judgment device." *Gauck v. Meleski*, 346 F.2d 433, 436 (5th Cir. 1965).

"Courts have interpreted the "sham affidavit rule differently in the same circumstances. And different judges will give different reactions to whether the

affiant gave a credible explanation for the contradictions of testimony or a "satisfactory explanation of why the testimony is changed...and why this later assertion should be taken seriously." Charles A. Wright, Authur R. Miller, Mary Kay Kane, Federal Practice and Procedure. 3d. Ed § 2726 (1998)

See Colantuoni v. Alfred Calcagni & Sons, Inc., 44 F.3d 1, 4-5 (1st Cir. 1994); *Perma Research and Dev. Co. v. Singer Co.*, 410 F.2d 572, 578 (2nd Cir. 1969); *Martin v. Merrell Dow Pharmaceuticals, Inc.*, 851 F.2d 703, 705 (3rd Cir. 1988); *Barwick v. Celotex Corp.*, 736 F.2d 946, 960 (4th Cir.1984); *Rohrbough v. Wyeth Laboratories, Inc.*, 916 F.2d 970, 975 (4th Cir. 1990); *Albertson v. T.J. Stevenson Co.*, 749 F.2d 223, 228 (5th Cir.1984); *S.W.S. Erectors, Inc. v. Infax, Inc.*, 72 F.3d 489, 495-96 (5th Cir. 1996); *Reid v. Sears, Roebuck & Co.*, 790 F.2d 453, 460 (6th Cir. 1986); *Darnell v. Target Stores*, 16 F.3d 174, 176 (7th Cir.1994); *Miller v. A.H. Robins Co., Inc.*, 766 F.2d 1102, 1104 (7th Cir. 1985); *Camfield Tires, Inc. v. Michelin Tire Corp.*, 719 F.2d 1361, 1365- 66 (8th Cir. 1983); *Radobenko v. Automated Equipment Corp.*, 520 F.2d 540, 544 (9th Cir. 1975); *Franks v. Nimmo*, 796 F.2d 1230, 1237 (10th Cir. 1986); *Van T. Junkins and Associates, Inc. v. U.S. Industries, Inc.*, 736 F.2d 656, 657 (11th Cir. 1984); *Sinskey v. Pharmacia Ophthalmics, Inc.*, 982 F.2d 494, 498 (Fed. Cir. 1992).

Quoting: *Allstate Indemnity co & Allstate Insurance Company, v. Ridgely* Ariz. 440, 153 P.3d 10692 (2007), the court said:

"Finally, none of the cases has adopted a bright-line test to determine when an affidavit is a sham.

Rather, the consensus is that the issue must be dealt with on a case-by-case basis. *See Adler v. Fed. Republic of Nigeria*, 107 F.3d 720, 728 (9th Cir. 1997) (prior to disregarding contradictory affidavits, a trial court "'must make a factual determination that the contradiction was actually a sham'"), *quoting Kennedy v. Allied Mut. Ins. Co.*, 952 F.2d 262, 267 (9th Cir. 1991) [*12] (trial court required to "actually examin[e] [plaintiff]'s actions and ma[k]e a finding of fact that they were a 'sham'"); *Sch. Dist. No. 1J, Multnomah County v. ACandS, Inc.*, 5 F.3d 1255, 1264 (9th Cir. 1993) (contradictory affidavit not automatically disregarded); *Durtsche v. Am. Colloid Co.*, 958 F.2d 1007, 1010 n.2 (10th Cir. 1992) (same); *see also MacLean, 195 Ariz.* 335, P2d., 986 P.2d at 904 (court did not apply sham affidavit rule because deposition and affidavit "not clearly [in] conflict"); *Gatson v. The Rest. Co.*, 260 F. Supp. 2d 742, 760-61 (N.D. Iowa 2003) (court found statements "not directly contradictory" and did not apply sham affidavit rule); *Treadwell v. Dow-United Techs.*, 970 F. Supp. 962, 967 (M.D. Ala. 1997) (court refused to apply rule because affidavit and testimony could be read consistently)."

The circuits are split as to the scope of permissible changes that may be made to a deposition transcript under Fed. R. Civ. Proc. Rule 30(e). 7 Moore's Federal Practice § 30.60[3](Matthew Bender 3d ed. 2006).

Some courts have held that the only changes permitted by Rule 30(e) are non-substantive in nature, such as the correction of typographical or spelling errors. See, e.g., *Burns v. Bd. of County Comm'rs*, 330 F.3d 1275, 1282 (10th Cir. 2003); *Greenway v. Int'l Paper Co.*, 144 F.R.D. 322, 325 (W.D. La. 1992). Other

courts, including the Second Circuit, have allowed deponents to make any change, in form or substance, to their deposition transcript. See *Podell v. Citicorp Diners Club, Inc.*, 112 F.3d 98, 103 (2d Cir. 1997) (affirming District Court's_finding that deponent was not entitled to have his altered answers replace the original ones, but rather that his changed answers became a part of the record generated during discovery).

Quoting *Jiminez v. All American Rathskeller, Inc.*, 503 F.3d 247, 253 (3d Cir. 2007)

"Some federal courts have adopted a particularly robust version of the sham affidavit doctrine, holding that, whenever a subsequent affidavit contradicts prior deposition testimony, it should be disregarded. See *Buckner v.Sam's* Club, Inc., 75 F.3d 290, 292-93 (7th Cir.1996) ("The concern in litigation is that a party will first admit no knowledge of a fact but will later come up with a specific recollection that would override the earlier admission."); *Adams v. Greenwood*, 10 F.3d 568, 572 (8th Cir.1993) (holding that "an affidavit denying what is established by one's own evidence does not preclude summary judgment"); *Jones v. General Motors Corp.*, 939 F.2d 380, 385 (6th Cir.1991) (holding that "it is well settled that a plaintiff may not create a factual issue for the purpose of defeating a motion for summary judgment by filing an affidavit contradicting a statement the plaintiff made in a prior deposition").

However, this Court and other courts of appeals have adopted a more flexible approach. See *Baer v. Chase*, 392 F.3d 609, 624 (3d Cir.2004), *Hackman v. Valley Fair*, 932 F.2d 239, 241 (3d Cir.1991), *Martin v.*

Merrell Dow Pharm., Inc., 851 F.2d 703, 705-706 (3d Cir.1988); see also *Kennedy v. Allied Mut. Ins. Co.* 952 F.2d 262, 266-67 (9th Cir.1991). We observed in Baer 392 F.3d at 625., that not all contradictory affidavits are necessarily shams. Instead, we stated that, "[w]hen there is independent evidence in the record to bolster an otherwise questionable affidavit, courts generally have refused to disregard the affidavit." Id. Such corroborating evidence may establish that the affiant was "understandably" mistaken, confused, or not in possession of all the facts Id. We have also held that an affiant has the opportunity to offer a "satisfactory explanation" for the conflict between the prior deposition and the affidavit. *Hackman*, 932 F.2d at 241. during the previous deposition. When a party does not explain the contradiction between a subsequent affidavit and a prior deposition, it is appropriate for the district court to disregard the subsequent affidavit and the alleged factual issue in dispute as a "sham," therefore not creating an impediment to a grant of summary judgment based on the deposition."

In two Ninth Circuit decisions, *Nelson v. City of Davis*, 2009 571 F.3d 924 (9th Cir. July 9, 2009), and *Van Asdale v. International Game Technology*, F.3d, 2009 WL 2461906 (9th Cir. Aug. 13, 2009) The circuit narrowed the scope of the application of the "sham affidavit" doctrine and emphasized that it must be used with caution but specifically found in *Nelson* that it does not apply to a non-party witness as in the Petitioners case.

In *Reese v. Herbert* 527 F.3d (11th Cir 2008) the affidavit(s) in question were from non-parties to the lawsuit, and the court found no prior rulings "that

squarely addressed whether, and in what circumstances, a district court may disregard the affidavit of a non-party that is inherently inconsistent with deposition testimony given by the non-party previously in the same case.

"[W]e would be unable, absent great trepidation, to affirm a similar finding [that a contradictory affidavit constitutes a sham] with respect to a disinterested witness' constradictory affidavit." *Lane v. Celotex Corp.* 782 F.2d at 1531. (11th Cir. 1986).

CONCLUSION

Courts have no authority to ignore evidence specifically cited to and relied upon by a party without mention, failing to give such evidence any weight under the guise of this Doctrine. The petition for a writ of certiorari should be granted.

Respectfully submitted.

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Pro Se Petitioners

(any footnotes trail end of each document)
Nos. 09-12821 & 09-13714 Non-Argument Calendar
UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

STEVEN D. SANTHUFF, DIANA MENDEZ SANTHUFF, Plaintiffs-Appellants,

versus

STEVE SEITZ, in his individual capacity, Defendant-Appellee.

July 6, 2010, Filed

Appeals from the United States District Court for the Northern District of Georgia. D. C. Docket No. 05-02517-CV-WSD-1.

Before EDMONDSON, BIRCH and CARNES, Circuit Judges.

PER CURIAM:

Steven and Diane Santhuff brought this 42 U.S.C. § 1983 action against Steve Seitz, an officer of the Georgia Department of Natural Resources ("the Department"), alleging violations of their Fourth and Fourteenth Amendment rights. The district court, upon reconsideration, granted Seitz's motion for summary judgment. The Santhuffs appeal that decision as well as the district court's award of costs and attorneys fees to Seitz.

I.

A.

In 2003 the United States Fish and Wildlife Service invited the Department to participate in Operation Snapper, a joint investigation into misconduct involving freshwater turtles. The Alabama Department of Conservation and Natural Resources also participated in the cooperative effort. Seitz served as lead agent for the operation in Georgia. During Operation Snapper, Seitz worked with two agents of the Fish and Wildlife Service, Garry Phillips and Hal Hamrick. He also worked with Michael Bloxom, an officer with the Alabama Department of Conservation and Natural Resources.

Seitz learned that Steve Santhuff was a turtle enthusiast and dealer in turtles. On July 10, 2003, a concerned citizen informed Seitz that Santhuff possessed at his residence species of turtles protected by state and federal law. At that point, Santhuff became the focus of a joint federal and state criminal investigation.

The events at the heart of this case occurred on July 14, 2005. The parties agree that no warrant authorizing the search of the Santhuffs' property had been issued at that point and that Phillips and Bloxom visited the Santhuffs' Georgia residence that day. Hamrick might have accompanied Phillips and Bloxom. The officers posed as city utility workers. They drove a utility truck and wore hard hats and green reflective vests.

The parties also agree that officers photographed the Santhuffs' backyard on July 14, 2005. Some of those photographs show stock tanks covered with wire lids.

Two of the photographs focus on an individual tank. In one of those single-tank photographs, two sticks are poking through the wire lid of a tank near the Santhuffs' neighbor's fence line. In the other, alligator snapping turtles can be seen below the water's surface in the tank. The parties' consensus on the facts ends there.

Santhuff contends that the agents trespassed onto his property on July 14, 2005 in order to gather evidence to help secure a search warrant. He believes that the photographs taken of his property on July 14 show that the officers trespassed in his backyard. Later, Santhuff's friend Lance Fisher executed three affidavits attesting that on July 14 he saw officers take turtles from the Santhuffs' property and that he saw Seitz personally participating in that warrantless search and seizure.

Seitz asserts that he did not personally investigate the Santhuffs' residence on July 14. Instead, Phillips and Bloxom informed him that, while standing on the outside of the fence surrounding the Santhuffs' backyard, they had seen a stock tank containing an alligator snapping turtle, which is a protected species under Georgia law. Ga. Comp. R. & Regs. 391-4-10-.09(3)(n). According to Seitz, Phillips and Bloxom also told him that they had seen more than twenty stock tanks in the Santhuffs' backyard and that about nine of them were partitioned off in what looked like a breeding area. Bloxom and Phillips showed Seitz the photographs they took on July 14, including a picture of alligator snapping turtles. The agents told Seitz that they had made all of their observations and had taken

all of their photographs from the backyard of the Santhuffs' neighbors.

On July 15, 2005, Seitz contacted the Department's special permits unit and asked if Santhuff had a license to possess alligator snapping turtles. The Department said he did not. Three days later, Seitz prepared an affidavit requesting a warrant to search the Santhuffs' home and property. In support of the search warrant application, Seitz showed to a Georgia Superior Court Judge some of the July 14 photographs of the Santhuffs' backyard. The judge issued the search warrant that same day.

On July 21, 2005, Seitz, along with state and federal officers, executed the search warrant. The officers seized some of the Santhuffs' property, including some turtles.

B.

The Santhuffs filed a lawsuit against Seitz in his individual capacity under 42 U.S.C. § 1983. The Santhuffs make four arguments alleging that their Fourth and Fourteenth Amendment rights were violated. First, they allege that in June 2005 or on July 14, 2005, Seitz, or someone at his direction, trespassed onto their property and illegally obtained evidence that was later used to obtain a search warrant. Second, they claim that Seitz knowingly misstated or omitted material information when he applied for a warrant to search their property. Third, the Santhuffs argue that there was insufficient probable cause for the issuance of a warrant. Finally, they claim that the warrant was so

broad that it constituted an impermissible general warrant.

After the Santhuffs filed their lawsuit against Seitz, in February 2006 Steve Santhuff was charged with twenty-one counts of violating various provisions of Title 27 of the Official Code of Georgia, which deals with wildlife. The criminal charges against Santhuff related to the possession of protected species of animals. Meanwhile the district court stayed the Santhuffs' civil suit pending the outcome of the criminal proceedings.

A jury acquitted Santhuff of all criminal charges, and the district court lifted the stay of the Santhuffs' § 1983 suit. Near the end of the discovery period, Santhuff was deposed. He testified that he did not "have any evidence . . . that Steve Seitz walked on [my] property and took turtles from me before the search warrant."

Seitz moved for summary judgment. Suddenly, the Santhuffs did have evidence that Seitz had unlawfully entered their property and had taken turtles from them before the search warrant was issued. The new evidence came in the form of an unexpected recollection by their friend, Lance Fisher.[1] The Santhuffs' opposition to summary judgment included Fisher's affidavit dated about a month after Santhuff's deposition was taken. This was the first of Fisher's affidavits. Fisher had never been identified before as a witness who could support the Santuffs' allegation that their property had been unlawfully entered or searched.

In Fisher's first affidavit he swore that he drove past

the Santhuffs' home on the afternoon of July 14, 2005 and saw two men standing by a white utility vehicle across the street from the Santhuffs' residence. He saw two other men carrying a metal wash tub across the street toward the utility vehicle. According to Fisher, all of the men wore tool belts and hard hats, and the two men carrying the metal tub were Hamrick and Seitz. Fisher attested that he "did not realize who Mr. Seitz was until [he] saw him in photos available after Mr. Santhuff's deposition." Fisher attached to his affidavit the photo he claimed jogged his memory. The photo was taken on July 21, 2005, when the search warrant was executed at the Santhuffs' residence. Hamrick and two other men appear in the photo with the metal washtub. Seitz is not in that photograph.

In response to Seitz's argument that Fisher lacked personal knowledge of Seitz's identity and appearance, Fisher submitted a second affidavit.[2] In his second affidavit, Fisher reiterated that he "did not realize who Mr. Steve Seitz was until [he] saw him in photos available after Mr. Santhuff's deposition." He explained that "[i]t was not until [he] recognized Hal Hamrick with the Tub in the one photo and then saw several other photos of Steve Seitz that [he] remembered these men in front of the home of [his] friend Steve Santhuff." He also said that he had seen Seitz in court during Santhuff's criminal trial. Attached to Fisher's second affidavit was the same photo that had been attached to his first affidavit.

The district court denied Seitz's motion for summary judgment.[3] It observed that the record was not carefully developed and that "[t]his is simply one of those cases where the parties have left the Court with a

record scattered with factual inconsistencies and questions about what really happened here." Based on Fisher's affidavit, the district court found that there was a genuine issue of material fact about whether Seitz illegally searched the Santhuffs' property (or knew that other officers had conducted an illegal search) before he applied for and obtained a search warrant. The court determined that, without the information allegedly obtained from an illegal entry onto the Santhuffs' property, the search warrant would not have been supported by probable cause.

After Seitz's motion for summary judgment was denied, Seitz deposed Fisher. Fisher's deposition testimony conflicted with his affidavit testimony. He testified in his deposition that he did not see any photographs of Seitz. Instead, Fisher recognized Seitz from the courtroom in Steve Santhuff's criminal proceedings. He testified that the photograph attached to his first two affidavits, a picture in which Seitz did not appear, prompted him to recall that Seitz was the other man helping Hamrick carry the wash tub away from the Santhuffs' property. Fisher testified that he did not see any other photographs before he signed his first two affidavits.

Soon after Fisher's deposition was taken, Seitz filed a motion asking the district court to reconsider its decision denying him summary judgment. Seitz argued that Fisher's two affidavits should be disregarded because they were contradicted by his later deposition testimony. The Santhuffs submitted a third affidavit from Fisher. In his third affidavit Fisher swore that his deposition testimony about not having seen any photographs, photos, or pictures of Seitz actually

referred to "printed photographs on paper." He attested that he had viewed pictures of Seitz on a computer monitor as part of a compact disc slide show made available to the Santhuffs only after Steve Santhuff's deposition.

The district court issued an opinion and order concluding that the conflict between Fisher's affidavits and his deposition testimony revealed that Fisher's affidavits were shams. It disregarded Fisher's affidavits and stated that "[n]o other evidence exists showing that [Seitz] either was on or near [the Santhuffs'] property without a search warrant or that [Seitz] knew that law enforcement officers were improperly on [the Santhuffs'] property and had improperly searched or obtained evidence prior to Seitz obtaining and executing the search warrant." Because no other material issues of fact existed, the court granted summary judgment to Seitz. Later it issued another order awarding attorney's fees and a separate order awarding costs to Seitz. We granted the Santhuffs' motion to consolidate their appeals from those decisions.

II.

As an initial matter, even though the Santhuffs are the appellants, they contend that we lack jurisdiction over this appeal. They argue that the district court has not entered a final order disposing of all of their claims. The Santhuffs correctly observe that in granting summary judgment to Seitz the district court focused on their argument that Seitz, or someone at his direction, trespassed into their backyard and illegally obtained evidence that was used to obtain a search warrant. The

district court did not specifically address their assertions that: Seitz misstated or omitted information vital to the existence of probable cause when applying for the warrant; probable cause did not support the application for the warrant; and an impermissibly broad general warrant was issued. The Santhuffs request that we remand to the district court and instruct it to consider those unresolved "claims."

The Santhuffs confuse arguments with causes of action. "Claims are separable when there is more than one possible recovery . . . or if different sorts of relief are sought." *In re Southeast Banking Corp.*, 69 F.3d 1539, 1547 (11th Cir. 1995) (citation and quotation marks omitted). The Santhuffs' single-count complaint asserts only one basis for liability--that Seitz violated their rights under the Fourth and Fourteenth Amendments. While the complaint advances several arguments about exactly how Seitz committed those alleged violations, each of those arguments is designed to establish the Santhuffs' entitlement to the relief requested in paragraphs sixteen, seventeen, and eighteen of their complaint. Those arguments are not separate claims for relief. *See Schexnaydre v. Travelers Ins. Co.*, 527 F.2d 855, 856 (5th Cir. 1976) ("True multiplicity is not present where, as here, the plaintiff merely presents alternative theories, drawn from the law of the same sovereign, by which the same set of facts might give rise to a single liability.").[4] Because the district court issued a final decision, we have jurisdiction over this appeal. *See* 28 U.S.C. § 1291.

III.

We now turn to the merits, which we review *de novo*.

See Fanin v. U.S. Dep't of Veterans Affairs, 572 F.3d 868, 871 (11th Cir. 2009). The Santhuffs contend that disputed facts remain about whether Seitz participated in a warrantless search of their property or knew that a warrantless search had occurred when he completed the affidavit requesting a search warrant on July 18, 2005. They argue that the district court erred by disregarding Fisher's affidavits as shams. According to the Santhuffs, any inconsistencies between Fisher's affidavits and his deposition testimony present issues of credibility to be weighed by a jury.

We have explained that "[w]hen a party has given clear answers to unambiguous questions which negate the existence of any issue of material fact, that party cannot thereafter create such an issue with an affidavit that merely contradicts, without explanation, previously given clear testimony." *Van T. Junkins & Assoc. v. U.S. Indus., Inc.*, 736 F.2d 656, 657 (11th Cir. 1984). In *Lane v. Celotex Corp.*, 782 F.2d 1526 (11th Cir. 1986), we clarified that "we may *only* disregard an affidavit that 'contradicts, *without explanation*, previously given clear testimony.'" *Id.* at 1532 (quoting Van T. Junkins, 736 F.2d at 657); *see also Tippens v. Celotex Corp.*, 805 F.2d 949, 955 (11th Cir. 1986) (Hill, J., specially concurring) ("The *Lane* decision drastically limits this court's holding in [*Van T. Junkins*]."). We have explained that the *Van T. Junkins* "rule is applied 'sparingly because of the harsh effect it may have on a party's case.'" *Allen v. Bd. of Pub. Educ. for Bibb County*, 495 F.3d 1306, 1316 (11th Cir. 2007) (quoting *Rollins v. TechSouth, Inc.*, 833 F.2d 1525, 1530 (11th Cir. 1987)).

Without doubt, Fisher's deposition testimony and his

affidavit attestations conflict. First Santhuff testified in his deposition that he had no evidence that Seitz had entered his property and had taken turtles without a warrant. Then his friend Fisher attested that he suddenly remembered being an eyewitness to Seitz's carrying away a tub of turtles from the Santhuffs' property. Fisher attested that a picture of Hamrick and two other men as well as photos of Seitz jumpstarted his stalled memory. Then Fisher testified in his deposition that he had seen no photographs of Seitz. Then Fisher attested in a third affidavit that when he said "photographs" in his deposition, he meant ones that were printed on paper, not images of photographs that he saw on a computer or CD slide show. Unsurprisingly, the district court found that explanation unconvincing.

"[O]ur cases require a court to find some inherent inconsistency between an affidavit and a deposition before disregarding an affidavit" and state that if no such inherent inconsistency exists, "any conflict or discrepancy between the two documents can be brought out at trial and considered by the trier of fact." *Rollins v. TechSouth, Inc.*, 833 F.2d 1525, 1530 (11th Cir. 1987). We have also said that "[a] definite distinction must be made between discrepancies which create transparent shams and discrepancies which create an issue of credibility or go to the weight of the evidence." *Tippens*, 805 F.2d at 953. Fisher's contradictory statements constitute an inherent inconsistency creating a transparent sham. *Id.*

Fisher's third affidavit does not offer an adequate explanation for the discrepancy between Fisher's first two affidavits and his deposition testimony. Fisher

twice attested that he had seen photographs of Seitz. Then he repeatedly testified in his deposition that he had not. Then he attested that he was referring to "printed photographs on paper," not pictures in a slide show displayed on a computer monitor. It simply cannot be that in his first two affidavits Fisher understood the word "photograph" to mean pictures stored on the computer, but in his deposition he understood it to mean only printed images on paper. That is not a plausible explanation. *See Van T. Junkins*, 736 F.2d at 656 ("[A] district court may find an affidavit which contradicts testimony on deposition a sham when the party merely contradicts its prior testimony without giving any valid explanation.").

We recognize that Fisher was not a party to this lawsuit, and "we have never squarely addressed whether, and in what circumstances, a district court may disregard the affidavit of a non-party that is inherently inconsistent with deposition testimony given by the non-party previously in the same case," *Reese v. Herbert*, 527 F.3d 1253, 1270 n.28 (11th Cir. 2008). We see no reason, however, to refuse to apply the sham rule under the particular facts of this case. A sham is a sham. *See Adelman-Tremblay v. Jewel Cos.*, 859 F.2d 517, 521 (7th Cir. 1988) ("The purpose of summary judgment motions--to weed out unfounded claims, specious denials, and sham defenses--is served by a rule that prevents a party from creating issues of credibility by allowing one of its witnesses to contradict his own prior testimony.") (quotation marks and citation omitted). The conflict between Fisher's first two affidavits and his deposition testimony was so direct and his explanation for the conflict was so implausible that it would defy logic not to apply the sham rule here.

The discrepancies are even more glaring in light of Santhuff's own earlier deposition testimony that he had no evidence that Seitz unlawfully entered the Santhuffs' property and took turtles. Evidence that suddenly appeared after Santhuff's deposition in the form of Fisher's unexpected recollection turned out to be implausible at its core. The fact that the sham evidence came from a non-party does not change the implausibility of it.

Fisher's deposition testimony conflicted with his first two affidavits, and his third affidavit offered no plausible explanation for the conflict. The district court did not err by disregarding Fisher's sham affidavits. Furthermore, summary judgment in favor of Seitz was proper because no genuine issue of material fact remained after Fisher's affidavits were found to be a sham.

IV.

After Seitz prevailed on his motion to reconsider, he filed a motion requesting $ 51,485 in attorney's fees under 42 U.S.C. § 1988, 28 U.S.C. § 1927, Fed. R. Civ. P. 54(d)(2)(B), and LR 54.2, NDGa. He sought fees from the date that the Santhuffs submitted Fisher's first affidavit with their opposition to summary judgment. The Santhuffs argued that Fisher's affidavits were explanatory instead of contradictory and that the affidavits did not make the pursuit of the litigation frivolous.

The district court found that Seitz was entitled to an award of attorney's fees because the Santhuffs continued the litigation after they were put on notice

that Fisher's testimony was fabricated. Fisher had testified in two sworn affidavits that he had seen photographs of Seitz, testified in his deposition that he had not seen photographs of Seitz, and "fantastically explained" in a third affidavit that what he meant in his deposition testimony was that he had not seen any "print" photographs but had only seen photographs of Seitz on the computer. The district court found it "disturbing[]" that Fisher testified in his deposition that he did not discuss his testimony in the first two affidavits with plaintiffs' counsel. The court determined that the Santhuffs' "counsel should have investigated Fisher's statements when he submitted his first and second affidavits" and should have stopped litigating the case after Fisher's deposition testimony revealed that his "statements were manipulated."

The court concluded that Seitz was entitled to attorney's fees from the time that Fisher's first affidavit was filed because at that point the Santhuffs' claims were frivolous, unreasonable, and without foundation. *See Christiansburg Garment Co. v. EEOC*, 434 U.S. 412, 421, 98 S.Ct. 694, 700, 54 L. Ed. 2d 648 (1978) ("[A] district court may in its discretion award attorney's fees to a prevailing defendant in a Title VII case upon a finding that the plaintiff's action was frivolous, unreasonable, or without foundation, even though not brought in subjective bad faith."); *Hughes v. Rowe*, 449 U.S. 5, 14, 101 S.Ct. 173, 178, 66 L. Ed. 2d 163 (1980) (applying *Christiansburg* to § 1983 claims). The court found that the Santhuffs "were complicit in the submission of Fisher's affidavit." After Fisher's deposition, the Santhuffs' counsel "should have been aware of the untruthfulness of Fisher's testimony." The court, therefore, held the Santhuffs and their counsel

jointly responsible for paying the attorney's fees incurred from the date of Fisher's deposition, March 23, 2009.

The court accepted the hourly rate of $ 250 requested by Seitz's counsel as a reasonable, "if not slightly low," rate for the Atlanta market. It reduced the number of hours claimed by 53 for a total of 152.94 hours, resulting in a fee award of $ 38,235. The court found that 41.08 hours were incurred after the date of Fisher's deposition, so the Santhuffs' and their counsel were jointly responsible for $ 10,270 of the $ 38,235 award. In a separate order, the district court awarded Seitz costs in the amount of $ 6,135.62 under Fed. R. Civ. P. 54(d)(1).

"We review awards of attorney's fees and costs for abuse of discretion, revisiting questions of law de novo and reviewing findings of fact for clear error." *Kahane v. UNUM Life Ins. Co.*, 563 F.3d 1210, 1213 (11th Cir. 2009). In a § 1983 action, a district court may, "in its discretion, . . . allow the prevailing party . . . a reasonable attorney's fee as part of the costs." 42 U.S.C. § 1988. A district court may award reasonable attorney's fees to a prevailing defendant under § 1988 if it finds that the plaintiff's claims were frivolous, unreasonable, and without foundation, regardless of bad faith. *See Christiansburg Garment Co.*, 434 U.S. at 421, 98 S.Ct. at 700; *Hughes*, 449 U.S. at 14, 101 S.Ct. at 178.

A different standard, however, applies to an award of attorney's fees under 28 U.S.C. § 1927. We have explained:

> Section 1927 provides, in pertinent part, that "[a]ny attorney . . . who so multiplies the proceedings in any case unreasonably and vexatiously may be required by the court to satisfy personally the excess costs, expenses, and attorneys' fees reasonably incurred because of such conduct." Under the plain language of the statute, then, in order for a court to justify sanctions, it must find that three conditions apply:
>
> First, the attorney must engage in "unreasonable and vexatious" conduct. Second, that "unreasonable and vexatious" conduct must be conduct that "multiplies the proceedings." Finally, the dollar amount of the sanction must bear a financial nexus to the excess proceedings, i.e., the sanction may not exceed the "costs, expenses, and attorneys' fees reasonably incurred because of such conduct."

Hudson v. Int'l Computer Negotiations, Inc., 499 F.3d 1252, 1261-62 (11th Cir. 2007) (quoting *Peterson v. BMI Refractories*, 124 F.3d 1386, 1396 (11th Cir.1997)). "We have consistently held that an attorney multiplies proceedings unreasonably and vexatiously within the meaning of the statute only when the attorney's conduct is so egregious that it is tantamount to bad faith." *Amlong & Amlong, P.A. v. Denny's, Inc.*, 500 F.3d 1230, 1239 (11th Cir. 2007) (quotation marks omitted).

In the present case, the record shows that the district court did not abuse its discretion in awarding attorney's fees to Seitz under § 1988 based on its finding that

Fisher's affidavits were a sham.[5] The court, however, did not state whether it was holding counsel jointly responsible for $ 10,270 in fees under § 1988 or § 1927. The Santhuffs correctly point out that it is incorrect to hold counsel accountable for fees under § 1988. *See Roadway Exp., Inc. v. Piper*, 447 U.S. 752, 761 n.9, 100 S.Ct. 2455, 2461 n.9, 65 L. Ed. 2d 488 (1980) (The Senate Report accompanying § 1988 stated that the bill authorizes 'an award of attorneys' fees against a *party* . . . .' S. Rep. No.94-1011, p.5 (1976), U.S. Code Cong. & Admin. News 1976, p.5912 (emphasis supplied). This reference reinforces the view that the statute was not intended to permit recovery from opposing counsel."). If the court intended to hold counsel jointly responsible for fees under § 1927, it needed to do so based on a finding that all of the § 1927 requirements, including the existence of bad faith, were satisfied. *See Hudson*, 499 F.3d at 1261-62. Because the district court did not specifically address the requirements of § 1927, we have an insufficient record to review its decision holding the Santhuffs' counsel jointly liable for $ 10,270 in attorney's fees, and a limited remand is necessary. *See Carmichael v. Birmingham Saw Works*, 738 F.2d 1126, 1139 (11th Cir. 1984) (remanding for the parties and the court to "produce a record of adequate detail to permit meaningful and efficient review"). On remand the district court should determine whether under § 1927 the Santhuffs' counsel is jointly liable for those fees that were incurred by Seitz after Fisher's deposition was taken.

AFFIRMED in part, VACATED and REMANDED in part.

Footnotes

1Fisher testified at Santhuff's criminal trial but at that time did not mention seeing Seitz on the Santhuffs' property before the search warrant was obtained.

2The district court noted that Fisher's second affidavit "was not available" to it when it ruled on Seitz's motion for summary judgment. The court did mention the second affidavit, however, when ruling on Seitz's motion to reconsider the earlier decision denying summary judgment to Seitz.

3The court granted Seitz's motion with respect to the Santhuffs' claims seeking injunctive relief because the lawsuit was brought against Seitz only in his individual capacity. *See Edwards v. Wallace Comty. Coll.*, 49 F.3d 1517, 1524 n.9 (11th Cir. 1995) (stating that claims for injunctive or declaratory relief are considered official capacity claims against the relevant governmental entity).

4In *Bonner v. City of Prichard*, 661 F.2d 1206, 1209 (11th Cir.1981) (en banc), we adopted as binding precedent all decisions of the former Fifth Circuit handed down before October 1, 1981.

5The Santhuffs contend that the district court was required to hold an evidentiary hearing before deciding whether to award attorney's fees. "Occasionally, evidentiary hearings are necessary." *Norman v. Hous. Auth. of Montgomery*, 836 F.2d 1292, 1303 (11th Cir. 1988). A hearing, however, is not absolutely required. *See id.*

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1:05-cv-2517-WSD
IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

STEVEN D. SANTHUFF and DIANA MENDEZ SANTHUFF
Plaintiffs,

v.

STEVE SEITZ, in his individual capacity,
Defendant.

OPINION AND ORDER

This matter is before the Court on the mandate of the United States Court of Appeals. On July 9, 2009, this Court granted Defendant Steve Seitz's motion for an award of attorneys' fees as a prevailing party under 42 U.S.C. § 1988. The Court awarded Defendant attorneys' fees in the amount of $38,325.00 and concluded that Plaintiffs' counsel should jointly be responsible for $10,270.00 of the award because though counsel should have been aware that certain evidence in Plaintiffs' case was inherently unreliable, they nonetheless permitted the litigation to proceed. After an appeal, this case was remanded for the limited purpose of determining whether, under the standard provided in 29 U.S.C. §1927, Plaintiffs' counsel may be held liable for attorneys' fees. Although a close call, the Court concludes the answer is "no," and vacates the portion of its July 9, 2010, Order that held Plaintiffs' counsel liable for a portion of the attorneys' fees award.

Section 1927 provides that "[a]ny attorney . . . who so multiplies the proceedings in any case unreasonably and vexatiously may be required by the court to satisfy personally the excess costs, expenses, and attorneys' fees reasonably incurred because of such conduct." To justify sanctions, the Court must find that three conditions apply:

> First, the attorney must engage in "unreasonable and vexatious" conduct. Second, that "unreasonable and vexatious" conduct must be conduct that "multiplies the proceedings." Finally, the dollar amount of the sanction must bear a financial nexus to the excess proceedings, i.e., the sanction may not exceed the "costs, expenses, and attorneys' fees reasonably incurred because of such conduct."

Hudson v. Int'l Computer Negotiations, Inc., 499 F.3d 1252, 1261-62 (11th Cir. 2007) (quoting Peterson v. BMI Refractories, 124 F.3d 1386, 1396 (11th Cir. 1997)). "[A]n attorney multiplies proceedings unreasonably and vexatiously within the meaning of the statute only when the attorney's conduct is so egregious that it is tantamount to bad faith." Amlong & Amlong, P.A. v. Denny's, Inc., 500 F.3d 1230, 1239 (11th Cir. 2007).

In this case, the Court concluded that, although Plaintiffs were put on notice that witness testimony from Lance Fisher was fabricated, neither Plaintiffs nor their counsel undertook to test the veracity or credibility of Mr. Fisher before filing Mr. Fisher's affidavit. Because his affidavit was a sham, and was the only evidence against Defendant, the Court necessarily concluded that this troubling record warranted an

award of attorneys' fees.

The question presented today, however, is whether Plaintiffs' counsel, Stephen J. Wasley and Nicholas G. Dumich, engaged in conduct egregious enough to satisfy the requirements of § 1927. The Court observes that Plaintiffs' initial counsel withdrew from this matter, possibly in recognition of Plaintiffs' intended reliance on Fisher's concocted testimony. Although the Court remains troubled by the conduct of Plaintiffs' subsequent counsel, in light of the fact that Messrs. Wasley and Dumich took over the representation late in this action, and may not have been fully aware of all the indicia of unreliability surrounding Mr. Fisher's testimony, the Court cannot conclude that counsels' conduct was "so egregious that it is tantamount to bad faith." Amlong, 500 F.3d at 1239. Though counsels' conduct is disturbing, because the requirements of § 1927 are not met, counsel may not be held jointly responsible for the attorneys' fees awarded to Defendant.

For the foregoing reasons,

IT IS HEREBY ORDERED that the portion of the Court's Order dated July 9, 2010, which ordered counsel for Plaintiffs, Stephen J. Wasley and Nicholas G. Dumich, to be jointly and severally liable with Plaintiffs for $10,270.00 of the attorney's fees awarded to Defendant Steve Seitz, is VACATED. Plaintiffs alone shall be liable for the award.

SO ORDERED this 16th day of September, 2010.

WILLIAM S. DUFFEY, JR.

UNITED STATES DISTRICT JUDGE

Filed 04/30/09
1:05-cv-2517-WSD

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

STEVEN D. SANTHUFF and DIANA MENDEZ SANTHUFF,
Plaintiffs,

v.

STEVE SEITZ, in his individual capacity,
Defendant.

OPINION AND ORDER

This matter is before the Court on Defendant Steve Seitz's ("Defendant") Out of Time Motion for Reconsideration of this Court's Order Denying Defendant's Motion for Summary Judgment Based on the Deposition of Lance Fisher ("Motion for Reconsideration") [63] and Defendant's Motion for Leave to File Out of Time Motion for Reconsideration ("Motion for Leave") [64].

I. BACKGROUND

This is a 42 U.S.C. § 1983 action arising out of the search and seizure of various turtles from of Plaintiffs Steven D. Santhuff ("Steve Santhuff") and Diana Mendez Santhuff's ("Diana Santhuff") (sometimes collectively referred to as, "Plaintiffs") home on July 21, 2005, pursuant to a warrant issued by Judge Melodie Snell Conner of the Gwinnett County Superior Court.

Plaintiffs claim Defendant violated their Fourth and Fourteenth Amendment rights by illegally obtaining, misstating, and omitting certain information used to obtain the search warrant. The crux of this litigation concerns whether Defendant Seitz used information obtained from an unconstitutional search of Plaintiffs' property to obtain the warrant.

On October 27, 2008, Defendant filed his Motion for Summary Judgment. On January 28, 2009, the Court issued an order ("January 28 Order") granting in part, and denying in part, Defendant's motion. In denying in part Defendant's motion for summary judgment, the Court relied on the affidavit testimony of Lance Fisher, who testified that he saw Defendant carrying a metal wash tub across the street from Plaintiffs' property on July 14, 2005 before Defendant had obtained a search warrant. Fisher also stated that three other men were with the Defendant.

The Court found that this statement in Fisher's affidavit created genuine issues of material fact as to whether Defendant either was on Plaintiffs' property prior to applying for and executing the search warrant, or whether Defendant knew that law enforcement officers were improperly on Plaintiffs' property and had improperly searched or obtained evidence prior to Defendant obtaining and executing the search warrant. See January 28 Order at 24.

On February 6, 2009, Defendant filed a Motion for Leave to Take the Deposition of Lance Fisher [60], which was subsequently taken on March 23, 2009. Following Fisher's deposition, Defendant filed his Motion for Reconsideration on April 1, 2009, claiming

statements Fisher made in his deposition contradicted his affidavit and prove that his affidavit is a sham. Defendant argues that Fisher's affidavit should not be considered by the Court in deciding the motion for summary judgment.

II. DISCUSSION

A. The Standard on a Motion for Reconsideration

The Court does not reconsider its orders as a matter of routine practice. LR 7.2(E), NDGa. A motion for reconsideration is appropriate only where there is:

(1) newly discovered evidence; (2) an intervening development or change in controlling law; or (3) a need to correct a clear error of law or fact. Jersawitz v. People TV, 71 F. Supp. 2d 1330, 1344 (N.D. Ga. 1999); Pres. Endangered Areas of Cobb's History, Inc. v. U.S. Army Corps of Eng'rs, 916 F. Supp. 1557, 1560 (N.D. Ga. 1995), aff'd 87 F.3d 1242 (11th Cir. 1996). A motion for reconsideration should not be used to present the Court with arguments already heard and dismissed, or to offer new legal theories or evidence that could have been presented in the previously-filed motion. Bryan v. Murphy, 246 F. Supp. 2d 1256, 1259 (N.D. Ga. 2003); see also Pres. Endangered Areas, 916 F. Supp. at 1560 ("A motion for reconsideration is not an opportunity for the moving party and their counsel to instruct the court on how the court 'could have done it better' the first time.").

B. Timeliness of the Motion for Reconsideration

Motions for reconsideration shall be filed within ten (10)

days after entry of the order or judgment. LR 7.2(E), NDGa. Plaintiffs argue that Defendant's Motion for Reconsideration is untimely and should be ignored. Plaintiffs also claim that Defendant may not use his Motion for Reconsideration as a vehicle to introduce evidence that should have been raised earlier. Specifically, Plaintiffs allege that the Defendant knew Lance Fisher was a potential witness when the Plaintiffs' Initial Disclosures were filed, and thus the Defendant has not justified why he did not depose Fisher at an earlier date.

Defendant claims that he relied on Plaintiffs' disclosure of the substance of Fisher's expected testimony and thus had not sought to depose Fisher during the discovery period. Defendant alleges that after the close of discovery and after Defendant filed his motion for summary judgment, Plaintiffs disclosed Fisher's affidavit for the first time in their response to Defendant's motion for summary judgment. Defendant learned for the first time in Fisher's affidavit that Fisher was an eye witness who allegedly saw Defendant near Plaintiffs' property. Defendant objected to portions of Fisher's affidavit, claiming they were not based on personal knowledge. These objections were overruled, and after the Court issued its January 28 Order, Defendant filed his Motion to Take Lance Fisher's Deposition on February 6, 2009. Defendant now claims that Fisher's deposition directly contradicts his affidavit, and that his affidavit is thus a sham. Defendant filed his Motion for Reconsideration on April 1, 2009, shortly after taking Fisher's deposition on March 23, 2009, and shortly after the deposition transcript was available.

A review of Plaintiffs' Initial Disclosures discredits Plaintiffs' argument that Defendant's Motion for Reconsideration is untimely. While Plaintiffs, in their Initial Disclosures filed on February 15, 2006, listed Lance Fisher as an individual likely to have discoverable information relevant to the disputed facts in this case, they described Lance Fisher's involvement only as follows: "Cared for Mr. Santhuff's turtles for 2 weeks in June of 2005. Noticed all but 1 map turtle vanished overnight from containers." Plaintiff's [sic] Mandatory Disclosures, Attachment A. There is nothing in the Initial Disclosures indicating Fisher saw Seitz or any individual at or near the Plaintiffs' property on July 14, 2005 or that he saw any individuals carrying a bucket near or across the street from Plaintiffs' property. Plaintiffs failed to supplement their Initial Disclosures upon allegedly learning that Fisher claimed he saw Defendant on July 14, 2005. In addition, Steven Santhuff testified several times during his own deposition that he did not know of any eye witnesses who could support his claim that Defendant was either on Plaintiffs' property or that Defendant knew that officers had entered Plaintiffs' property prior to executing the warrant on July 21, 2005.

The Court finds that Defendant did not unreasonably delay in filing his Motion for Reconsideration, and that reconsideration is necessary to correct a clear error of fact given the direct contradiction of Fisher's affidavit by his later deposition testimony.

C. Fisher's Affidavit

Rule 56 of the Federal Rules of Civil Procedure, which governs motions for summary judgment, states that "a

supporting or opposing affidavit must be made on personal knowledge, set out facts that would be admissible in evidence, and show that the affiant is competent to testify on the matters stated." Fed. R. Civ. P. 56(e). "Affidavits must also contain supporting facts demonstrating a basis for the affiant's claim that his statements are the product of his personal knowledge." Williams v. Great-West Healthcare, 2007 WL 4564176, at *5 (N.D.Ga. Jun. 8, 2007).

In Van T. Junkins and Assoc., Inc. v. U.S. Industries, Inc., the Eleventh Circuit held that a district court on a motion for summary judgment may properly disregard an affidavit which is a sham. 736 F.2d 656, 657 (11th Cir. 1984). "When a party has given clear answers to unambiguous questions which negate the existence of any genuine issue of material fact, that party cannot thereafter create such an issue with an affidavit that merely contradicts, without explanation, previously given clear testimony." Id. The Eleventh Circuit found that the plaintiff's affidavit was a sham since it conflicted directly with the answers plaintiff gave in three places in his deposition. Id. at 659. The Junkins court held that the sham affidavit submitted by the plaintiff did not create a genuine issue of material fact which required resolution by a jury. Id.

A court must find "some inherent inconsistency between an affidavit and a deposition before disregarding the affidavit." Rollins v. TechSouth, Inc., 833 F.2d 1525, 1530 (11th Cir. 1987). "Thus, a party cannot create a genuine issue of fact sufficient to survive summary judgment simply by filing an affidavit contradicting earlier deposition testimony." Johnson v. Louisville Ladder, 2008 WL 5122261, at *5 (S.D.Ala.

Nov. 14, 2008) (citing Tippens v. Celotex Corp., 805 F.2d 949, 954-55 (11th Cir. 1986)). "Such affidavits may be considered when the affidavit contains a satisfactory explanation of the contradictions between the affidavit and the affiant's earlier deposition testimony, or when newly discovered evidence furnishes a good faith basis for any inconsistency between the two." Id. (citing Clay v. Equifax, Inc., 762 F.2d 952 (11th Cir. 1985)).

In his first affidavit, Fisher claims he was driving by Plaintiffs' house on the afternoon of July 14, 2005 and saw two men crossing the street and carrying a metal wash tub to a utility vehicle. Fisher Affidavit dated November 24, 2008 ("Fisher Aff. I") at ¶ 15. He identified one of the two men as Seitz. Id. at ¶ 19. Fisher claims that he "did not realize who Mr. Seitz was until I saw him in photos available after Mr. Santhuff's deposition." Id.

During his deposition Fisher was asked repeatedly to identify which photographs he was referring to in his affidavit, i.e., what were the photographs he saw that made him realize Defendant was one of the two men carrying a metal wash tub across the street from Plaintiffs' house. The following is one the exchanges during Fisher's deposition:

> Q: Okay. When did you first remember the person you saw with Hal Hamrick – with Steve Seitz?
> A: Oh, it was right away when I saw that picture.
> Q: When you saw what picture?
> A: The picture – do you have the selection of pictures I can go through? I can show you the

picture.
Q: Why don't you describe the picture.
A: I believe this guy's name was Phillips. He was sitting to the left. There was the bucket.
Q: This one?
A: Yes, that one there.
Q: I'll show you what's been marked as Exhibit 3. When you saw this picture, you Realized [sic] it was Steve Seitz with Hal Hamrick in Exhibit 3?
A: Yes.
...
Q: What about this picture made you realize it was Steve Seitz that was with Hal Hamrick?
A: Well, the bucket was unique, and that's the biggest thing. It was, you know, them carrying across the street, him looking over, and looking away.
Q: He who?
A: He, Steve Seitz, looking over at me. So I got a look at him and then looking away, and then I did see him in court.

Fisher Deposition at 20:7-25; 21:3-13. The picture to which Fisher referred, identified as Exhibit 3, was the only picture attached to Fisher's first affidavit. Seitz is not in the picture. Fisher was then asked directly about his affidavit statements:

Q: Let's talk about paragraph 19. Do you see the last sentence?
A: Yes.
Q: What photographs are you referring to?
A: This particular one right here, Exhibit 3.
Q: You didn't realize who Steve Seitz was until you saw Exhibit 3?

A: Correct. I knew who Steve Seitz was from the courtroom, but I didn't realize it was him that particular day carrying the bucket.
Q: So seeing Exhibit 3 made you realize that Steve Seitz was carrying the bucket?
A: Yes, along with Hamrick.

Id. at 25:18-25; 26:1-4. Later in the deposition, Fisher was asked again to describe or identify which photographs he saw that made him realize that he saw Seitz across from Plaintiffs' house on July 14, 2005. Fisher was also asked about a second affidavit that he signed on December 30, 2008 ("Fisher Affidavit II"):

Q: (By Ms. Correia) Mr. Fisher, let's turn to Exhibit 4, your second affidavit. I think that's what you have.
A: Okay.
Q: Paragraph 19.
A: Okay.
Q: The middle sentence there says you didn't realize who Mr. Seitz was until you saw photos of him available after Mr. Santhuff's deposition. When did you first realize that the person you saw on the 14th was Steve Seitz?
A: When I saw this picture right here [Exhibit 3].
Q: That's the picture that made you realize?
A: Absolutely, yeah, and I'm not sure. This may have been
something that was changed because I remember seeing Steve Seitz, not in the photographs, but in court.
Q: So that sentence isn't true?

A: Photos? No, I don't recall seeing him in any photos.
Q: You don't recall seeing photographs with Steve Seitz in them?
A: No.
Q: What photographs did Steve Santhuff show you after his
deposition?
A: After his deposition?
Q: After Steve Santhuff was deposed in this case, did he show you
any pictures?
A: This is the only one that I saw, and it was probably about six
months ago. Then just recently I did see some damaged turtles, turtles where the head was damaged. I don't know if it was
dead or not.
Q: But at the time you signed your affidavit, was this the only
picture you had seen?
A: Yes.
Q: Is that true at the time you signed the second affidavit as well?
A: Yes.
Q: So you hadn't seen any photographs at all of Steve Seitz?
A: No, not that I recall.
Q: Okay. What photographs have you seen since?
A: Just a couple of turtles that were damaged. I think it was just
turtles.
Q: Were any people in the photos?
A: No.

Id. at 41:3-25; 42:1-25 (emphasis added). Fisher states on at least four occasions in his deposition that he did not see any photographs with Seitz in them, and that the only photograph that jogged his memory was Exhibit 3, which does not have Defendant in the photograph.

Plaintiffs have now offered a third affidavit from Fisher in an attempt to explain this discrepancy ("Fisher Aff. III"). In his third affidavit, Fisher claims that when he stated that he did not recall seeing Seitz in any photos or photographs, and that the only "picture" he had seen was Exhibit 3, he "was referring to printed photographs on paper" and not "pictures I had seen on a computer or CD slide show." Fisher Aff. III at ¶ 4. Fisher claims that with respect to paragraph 19 of his first and second affidavits, "where I state I did not realize who Seitz was until I saw him in photos available after Mr. Santhuff's deposition, I was referencing photos that were on a CD\slide show on a computer that was shown to me by Mr. Santhuff." Id. at ¶ 5. Fisher claims the computer slide show that Mr. Santhuff showed him included Exhibit 3 and an additional photograph depicting Seitz and two other individuals holding turtles. Id. at ¶ 6.

Under the facts presented, and confronted with three affidavits which contradict Fisher's deposition testimony and which attempt to demonstrate Fisher's personal knowledge that he saw Seitz near Plaintiffs' house, the Court concludes that Fisher's affidavit is a sham. The Court also concludes that no reasonable juror would find that Defendant Seitz was at or near Plaintiffs' property on July 14, 2005. Fisher was asked multiple times in his deposition to identify which were

the photographs that he had seen that reminded him that Seitz was the other man carrying the metal wash tub. Each time, Fisher gave clear answers to these unambiguous questions that the only photograph to which he was referring in paragraph 19 of his two affidavits was Exhibit 3, a photograph which did not include Seitz. Fisher was not asked about the media in which these photographs were conveyed, only if he had seen any photographs with Seitz. His answers were clear, unequivocal, and inherently inconsistent with all three of his affidavits. To present the Court with a third affidavit and claim that he was only referring to print photographs and not photographs he allegedly saw on a computer is simply not credible, and the Court believes this testimony was fabricated.

Fisher's testimony was the only evidence linking Defendant to Plaintiffs' property before the search warrant was executed. No other evidence exists showing that Defendant either was on or near Plaintiffs' property without a search warrant or that Defendant knew that law enforcement officers were improperly on Plaintiffs' property and had improperly searched or obtained evidence prior to Seitz obtaining and executing the search warrant. Furthermore, when Fisher was shown at his deposition a photograph that did contain Seitz, Fisher could not identify him. No genuine issue of material fact exists that requires submission to a jury, and summary judgment is appropriate.

III. CONCLUSION

For the foregoing reasons,

IT IS HEREBY ORDERED that Defendant's Motion for Reconsideration [63] is GRANTED.

IT IS FURTHER ORDERED that, on reconsideration, Defendant's Motion for Summary Judgment [45] is GRANTED.

IT IS FURTHER ORDERED that Defendant's Motion for Leave to File Out of Time Motion for Reconsideration [64] is GRANTED.

IT IS FURTHER ORDERED that Defendant's Motion for Leave to Take the Deposition of Lance Fisher [60] is DENIED AS MOOT.

SO ORDERED this 30th day of April, 2009.

WILLIAM S. DUFFEY, JR.
UNITED STATES DISTRICT JUDGE

Footnotes

1 The Court has not ruled on Defendant's Motion for Leave to Take the Deposition of Lance Fisher [60]. Plaintiffs did not file a response. "Failure to file a response shall indicate there is no opposition to the motion." LR7.1(B), NDGa. Because Defendant has taken Mr. Fisher's deposition, this motion is DENIED AS MOOT.

2 Fisher's second affidavit was not available to the Court in ruling on Defendant's Motion for Summary Judgment.

3 This additional photograph, attached to Fisher's third

affidavit, is not alleged to have been taken on Plaintiffs' property or taken on July 14, 2005. That Fisher now claims this computer picture is the photograph he was referring to in his first two affidavits defies believability.

4 The photograph shown to Fisher was that of three men and included a profile angle of Seitz on the right. The following is the relevant exchange:

> Q: All right. Exhibit Number 8, let me show you that one more time. Is there anybody in that one?
> A: Phillips and Floyd. I don't know who the guy is to the right.
> Q: Okay.
> A: I can't get a good look at him.

Fisher Dep. at 52:19-25. While the photograph only contained a profile angle of Seitz, the fact that Fisher could not identify Seitz in that photograph, despite seeing Seitz in court on at least two occasions during Mr. Santhuff's criminal trial, is further evidence that Fisher's affidavit is a sham. Fisher's failure to identify Seitz, combined with his repeated assertions that he did not see any photographs with Seitz in them after Mr. Santhuff's deposition, requires the Court to conclude that Fisher's affidavits are a sham.

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1:05-cv-2517-WSD
IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

STEVEN D. SANTHUFF and DIANA MENDEZ SANTHUFF ,
Plaintiffs,

v.

STEVE SEITZ, in his individual capacity,
Defendant.

OPINION AND ORDER

This matter is before the Court on Defendant Steve Seitz's ("Defendant") Motion for Summary Judgment [45], Notice of Objection to Affidavits Filed in Support of Plaintiffs' Opposition to Defendant's Motion for Summary Judgment [53], and Motion for Extension of Time to File Reply Brief in Support of Motion for Summary Judgment [54].

This is a 42 U.S.C. § 1983 action arising out of the search and seizure of various turtles from of Plaintiffs Steven D. Santhuff ("Santhuff") and Diana Mendez Santhuff's ("Diana Santhuff") (sometimes collectively referred to as, "Plaintiffs") home on July 21, 2005, pursuant to a warrant issued by Judge Melodie Snell Conner of the Gwinnett County Superior Court. Plaintiffs claim Defendant violated their Fourth and Fourteenth Amendment rights by illegally obtaining, misstating, and omitting certain information used in

obtaining the search warrant. The crux of this litigation concerns whether Defendant Seitz used information obtained from an unconstitutional search of Plaintiffs' property to obtain the warrant.

Specifically, Plaintiffs contend that Defendant was at least aware of the unlawful entry on their property on July 14, 2005, to obtain evidence on which the warrant was based, and that the circumstantial evidence shows that he was present when persons illegally entered on their property that day. Plaintiffs allege Defendant used evidence obtained from the alleged illegal search to obtain the warrant and thus he violated their constitutional rights. Because illegal searches are well-known to law enforcement officers as unconstitutional, Plaintiffs argue Defendant is not entitled to qualified immunity even though the evidence was obtained in connection with Defendant's law enforcement duties. Defendant, on the other hand, denies being present at the search, denies he was even on Plaintiffs' property that day, and denies knowing any illegal search was made by the two law enforcement officers who were at Plaintiffs' property on July 14, 2005. Defendant moves for summary judgment on all of Plaintiffs' claims.

The Court is cognizant of the duties and responsibilities of law enforcement officers and of the purposes of the doctrine of qualified immunity. The Court has invested considerable time to understand the facts in the record. The Court finds the record not well or carefully developed. This simply is one of those cases where the parties have left the Court with a record scattered with factual inconsistencies and questions about what really happened here. That is, the facts are disputed and which ones to accept and which to not are open issues

the resolution of which often depends on evaluating the credibility of witnesses with knowledge of the events of July 14, 2005. What confronts the Court is a classic example of disputed facts and credibility determinations which must be resolved by a jury, not the Court on summary judgment.[1]

The disputed facts and the issues presented to the Court are set forth in more detail below.

I. SUMMARY OF FACTS[2]

Defendant is a sergeant with the Georgia Department of Natural Resources ("GDNR") whose responsibilities include enforcement of the game and fish laws of Georgia [Def. St. of Undisp. Facts at ¶¶ 1, 3].[3]

During all times relevant to this case, Defendant was a certified peace officer of the State of Georgia and a certified officer of the United States Fish and Wildlife Service ("USFWS") [Id. at ¶ 8].

On or about July 10, 2003, Defendant received information from a "concerned citizen" that Plaintiff Steven Santhuff was in possession of various species of turtles at his residence, including species that are protected by state or federal law [Id. at ¶ 9]. Santhuff became the subject of an ongoing, joint federal and state criminal investigation [Id. at ¶ 10]. In the course of the investigation (the dates have not been identified in the record), Defendant located two internet advertisements by Santhuff: the first was an ad in which Santhuff was selling a video about the commercial exploitation of turtles [Id. at ¶ 12], and the second was for the sale of stock tanks. [Id. at ¶ 16] The

video depicted, among other things, alligator snapping turtles being caught. [Id. at ¶ 13][4] On some unknown date, an undercover officer purchased one of the videotapes from Santhuff and was able to determine that Santhuff was using residential property located at 2486 Rhine Way, Lawrenceville, Georgia [Id. at ¶ 15] in connection with his business.

On May 27, 2004, Defendant, working undercover as "Steve Davis", and USFWS agent Hal Hamrick met with Santhuff and purchased a stock tank from him. [Id. at ¶ 18] Santhuff subsequently mailed Defendant a receipt for the tank and his price list for stock tanks. [Id. at ¶ 19] The sales receipt was from Santhuff, and the words "Aqua Box Invoice" were typed on the top. Def. Ex. A. Following the meeting, Santhuff reported "Davis" (i.e., Defendant) to USFWS as being an illegal turtle dealer. Santhuff offered to participate in a sting operation targeting Defendant in his undercover identity.[5] [Id. at ¶ 21] The USFWS authorized Plaintiff to purchase eight (8) black knob sawback turtles from Defendant.[6] [Id. at ¶ 24] Santhuff later contacted Special Agent Gary Phillips of the USFWS to request that Phillips either retrieve the turtles, permit Santhuff to deliver the turtles to Phillips, or permit Santhuff to keep them. [Id. at ¶ 25]

In June 2005, Santhuff asked Lance Fisher, his neighbor, to look after his large turtle collection while Santhuff was out of the country. Santhuff Aff. at ¶ 6. Over the course of the last two weeks of June 2005, Fisher noticed at least three separate instances in which certain objects were moved or taken from Plaintiffs' backyard. Fischer Aff. at ¶ 11. Fisher noticed that a stack of wood propped up against a gate

had been knocked over; hoses were placed in one in-ground tank, and the tank had been siphoned dry; and some turtles had disappeared from a container of male map turtles that Fisher claims he had cleaned the previous day. Id. at ¶ 7. Fisher admits he never saw anyone enter the backyard. Id. at ¶ 11.

When Santhuff returned from his trip, he claims he noticed several items in his backyard either missing or misplaced. Santhuff Affidavit at ¶¶ 7-9. He states that the lids of several containers had been moved or left ajar. Id. at ¶¶ 7-8. Santhuff also discovered that between ten and thirteen Sabine Map turtles had been stolen and that he found the lid of one container ajar on July 15, 2005. Id. at ¶¶ 9-11. Cheri Moore, a friend of Santhuff's, testified that Santhuff told her on July 15, 2005, that he thought there might be some turtles missing. Mot. to Suppress Hearing at 147:1-19.

On or about July 14, 2005, Phillips and Agent Michael Bloxom of the Alabama Department of Conservation and Natural Resources, who was participating in the investigation, informed Seitz that they had observed an alligator snapping turtle in a stock tank in Plaintiffs' backyard at 2486 Rhine Way [DSUF at ¶ 28].[7] According to Seitz, three officers went to Plaintiffs' residence that day: Bloxom, Phillips, and Hamrick. Seitz Dep. at 51:1-12. Bloxom, when asked who else was at the residence that day, testified that he was there along with Phillips, but did not mention Hamrick. Motion to Suppress Hearing at 181:11-25. Phillips and Bloxom told Defendant they saw the turtles from a position outside of the fence surrounding Plaintiffs' backyard. [DSUF at ¶ 29]. They said they saw over twenty (20) stock tanks in Plaintiffs' backyard and also

saw approximately nine (9) stock tanks that were partitioned off from each other and which appeared to be a breeding area. [Id. at ¶¶ 30, 31]. They did not offer any explanation for why they reached this conclusion. Phillips and Bloxom shared with Defendant pictures of Plaintiffs' backyard and explained to him what they had seen. [Id. at ¶ 32]. The officers told Defendant they made all these observations from outside of Plaintiffs' fence. [Id. at ¶ 35][8] They also identified certain pictures which they claim show that Plaintiff processed what they believed were illegal alligator snapping turtles. Plaintiff claims these pictures, based on what they show and the angle at which they were taken, had to have been taken from a position on his property.[9] Agent Bloxom testified that neither he nor anyone else to his knowledge entered inside Plaintiffs' fence. Motion to Suppress Hearing of April 30, 2007 at 181:13-25; 182:1-19.

Also on July 14, 2005, Fisher, Plaintiffs' neighbor and the person who looked after Plaintiff's turtles while he was away, was driving by Plaintiffs' home between 1:00 and 3:00 p.m. Fisher Aff. at ¶ 15. Fisher states that he saw four men: two men near the back of a white utility vehicle parked across the street from Plaintiffs' house and two men crossing the street carrying a metal wash tub. Id. The men were wearing hard hats and tool belts in the vicinity of Plaintiff's property,[10] and they put the metal tub in the back of the vehicle. Id. at ¶ 16. Fisher states that one of the two men carrying the tub was Officer Seitz and that the other man was Hamrick. Id. at ¶ 19. Seitz, on the other hand, states that he did not accompany Phillips and Bloxom to Plaintiff's home on July 14, 2005. Seitz Aff. at ¶ 20. He claims the only time he was on Plaintiffs' property prior to executing

the warrant was on May 27, 2004, when he purchased a stock tank from Plaintiff. Id. at ¶ 21. He also claims he has no knowledge of anyone having seized turtles from Plaintiffs' backyard or having knowledge of any law enforcement officer having entered Plaintiffs' backyard in June 2005 or July 14, 2005. Id. at ¶¶ 23-25.

On July 14, 2005, Bloxom went with Phillips to retrieve the turtles Plaintiff had purchased in the sting operation. Mot to Suppress Hearing of March 30, 2007 at 80:11-25. Bloxom testified that he knocked on Plaintiffs' door and then entered Plaintiffs' curtilage by walking from the front door to the fence line on the right side of the house. Id. at 83:4-7. Seitz testified that he could not remember if the officers told him they were going to Plaintiffs' residence before they went on July 14, 2005. Seitz Dep. at 48:10-25. He also testified he knew they were going to talk to Santhuff about retrieving the turtles from Plaintiff. Id. at 49: 2-12. Seitz could not answer why the officers were dressed in an undercover capacity as city utility workers if they went to Plaintiffs' house to talk to Santhuff and retrieve the turtles. Id. at 53:1-25; 54:1-13.

On or about July 15, 2005, Defendant contacted the special permits unit of the GDNR to determine whether Santhuff had a license to possess alligator snapping turtles. [Id. at ¶ 37] Defendant was told that Santhuff did not have a license for this turtle species.[11] [Id. at ¶ 38]

On July 18, 2005, Defendant applied for a warrant to search Plaintiffs' residence at 2486 Rhine Way. [Id. at ¶ 39] In support of the search warrant application, Defendant showed the pictures taken by the agents to

the judicial officer who issued the warrant. [Id. at ¶ 40] The search warrant was signed by Gwinnett County Superior Court Judge Melodie Snell Conner on the same day as the application [id. at ¶ 41]. The warrant was executed on July 21, 2005. [Id. at ¶ 42] During the search, certain property was seized from Plaintiffs, including turtles, for which Santhuff was given a receipt by Defendant. [Id. at ¶ 43]

Santhuff was subsequently charged with one or more crimes related to the possession of protected species of animals. [Id. at ¶ 44] As part of the criminal case, Santhuff, represented by counsel, sought to suppress the evidence seized during the search on Fourth Amendment grounds. [Id. at ¶ 45] After a two day hearing on the motion to suppress, the court denied Santhuff's motion to suppress. [Id. at ¶ 46]

On September 28, 2005, Plaintiffs filed their Complaint [1] in this Court, claiming Defendant violated their rights under the Fourth and Fourteenth Amendments. Plaintiffs seek the return of seized property and damages, among other relief. On April 11, 2006, the Court stayed this action pending the conclusion of the underlying state criminal proceeding. The stay was lifted on March 5, 2008. Defendant filed his Motion for Summary Judgment on October 27, 2008.

II. DISCUSSION

A. Notice of Objections[12]

Defendant objects to the Affidavits of Lance Fisher, Diana Santhuff, and Santhuff. Defendant claims that these affidavits are not proper because they do not

contain statements based on the personal knowledge of the affiants.

Federal Rule of Civil Procedure 56 provides that a "supporting or opposing affidavit must be made on personal knowledge, set out facts that would be admissible in evidence, and show that the affiant is competent to testify on the matters stated." Fed. R. Civ. P. 56(e). The rule's personal knowledge requirement "prevents statements in affidavits that are based, in part, 'upon information and belief', --instead of only knowledge–from raising genuine issues of fact sufficient to defeat summary judgment." Pace v. Capobianco, 283 F.3d 1275, 1278 (11th Cir. 2002). In addition, an affidavit which contradicts prior testimony without any valid explanation can be considered a sham. Hegre v. Alberto-Culver USA, Inc., 508 F. Supp. 2d 1320, 1325 (S.D.Ga. 2007), aff'd 275 Fed. App'x 872 (11th Cir. 2008).

1. Affidavit of Lance Fisher

In his affidavit, Fisher claims he was driving by Plaintiffs' house on the afternoon of July 14, 2005 and saw two men crossing the street and carrying a metal wash tub to a utility vehicle. Fisher Aff. at ¶ 15. He identified one of the two men as Seitz.[13] Id. at ¶ 19.

Defendant argues that the affidavit of Fisher is not admissible because it does not establish that Fisher had personal knowledge to identify Defendant. Defendant also claims that Fisher's affidavit is contradictory to his earlier criminal trial testimony and other evidence, thereby making it so "blatantly contradicted by the record, so that no reasonable jury could believe it, [and

the] court should not adopt that version of the facts for purposes of ruling on a motion for summary judgment." Scott v. Harris, 127 S.Ct. 1769, 1776 (2007).

Defendant confuses credibility with personal knowledge. Defendant makes certain claims such as: "Fisher testifies that he 'did not realize who Mr. Seitz was until [he] saw him in photos available after Mr. Santhuff's deposition' . . .Testimony that an unidentified person(s) showed you a picture and told you that the person in that picture is Steve Seitz does not show that the affiant has personal knowledge of who Steve Seitz is"; "Fisher never testified that he saw anyone in or near Plaintiff's back yard [sic] in either proceeding [the criminal trial and the motion to suppress hearing]"; "Fisher does not explain why he did not recognize Steve Seitz, who sat at the prosecution table during the criminal trial, including during Fisher's testimony for the Plaintiff" (emphasis in original); and "It is simply beyond belief that Fisher witnessed any agents, much less Steve Seitz, in front of Plaintiff's home on July 14, 2005, and simply 'forgot' to mention the fluorescent lime green vests [worn by the agents] or mistook them for tool belts instead." Notice of Obj. at 4, 6, 7, 9.

Defendant's arguments do not demonstrate a lack of personal knowledge on the part of Fisher, but rather are attacks on Fisher's credibility. The fact is Fisher has presented testimony under oath based on the accumulated personal knowledge he had when his affidavit was executed: that on July 14, 2005, the person he saw was Defendant Seitz. While the Court acknowledges he may be mistaken in his identification and may even have confused the dates on which he observed the events about which he testified, the Court

cannot conclude that no reasonable jury could believe his testimony under oath. This is a classic example of a dispute a jury must resolve. "Issues of credibility and the weight afforded to certain evidence are determinations appropriately made by a finder of fact and not a court deciding summary judgment." McCormick v. City of Fort Lauderdale, 333 F.3d 1234, 1240 n. 7 (11th Cir. 2003).[14] "When a party has given clear answers to unambiguous questions which negate the existence of any genuine issue of material fact [for summary judgment], that party cannot thereafter create such an issue with an affidavit that merely contradicts, without explanation, previously given clear testimony." McCormick, 333 F.3d at 1240 n. 7 (emphasis in original). Fisher explained the reason he did not recognize Seitz at trial is that he "did not realize who Mr. Seitz was until I saw him in photos available after Mr. Santhuff's deposition." Fisher Aff. at ¶ 19. Notwithstanding Seitz's affidavit in which he states that he did not accompany agents Phillips and Bloxom to Plaintiffs' home on July 14, 2005, Fisher claims he saw Seitz crossing the street in front of Plaintiffs' property on July 14, 2005, carrying a metal wash tub. This statement is made based on his personal knowledge. Whose testimony is accurate and believable are credibility issues for the jury to decide.[15] Finally, whether Fisher failed to remember seeing the fluorescent vests and incorrectly remembered seeing tool belts also is a credibility issue for the jury.

2. Affidavit of Steven Santhuff

Certain portions of Santhuff's affidavit are also based on personal knowledge. Santhuff can testify about how things were arranged in his own backyard, as well as

what objects would be visible or not within his property. He has personal knowledge about the layout of his own backyard and the objects within it.[16]

B. The Standard on Summary Judgment

Summary judgment is appropriate where "the pleadings, the discovery and disclosure materials on file, and any affidavits show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c). The party seeking summary judgment bears the burden of demonstrating the absence of a genuine dispute as to any material fact. Herzog v. Castle Rock Entm't, 193 F.3d 1241, 1246 (11th Cir. 1999). Once the moving party has met this burden, the non-movant must demonstrate that summary judgment is inappropriate by designating specific facts showing a genuine issue for trial. Graham v. State Farm Mut. Ins. Co., 193 F.3d 1274, 1282 (11th Cir. 1999). The non-moving party "need not present evidence in a form necessary for admission at trial; however, he may not merely rest on his pleadings." Id.

"At the summary judgment stage, facts must be viewed in the light most favorable to the nonmoving party only if there is a 'genuine' dispute as to those facts." Scott v. Harris, 127 S. Ct. 1769, 1776 (2007). Where the record tells two different stories, one blatantly contradicted by the evidence, the Court is not required to adopt that version of the facts when ruling on summary judgment. Id. "[C]redibility determinations, the weighing of evidence, and the drawing of inferences from the facts are the function of the jury . . . ." Graham, 193 F.3d at 1282. "If the record presents factual issues, the court

must not decide them; it must deny the motion and proceed to trial." Herzog, 193 F.3d at 1246. The party opposing summary judgment "'must do more than simply show that there is some metaphysical doubt as to the material facts . . . . Where the record taken as a whole could not lead a rational trier of fact to find for the nonmoving party, there is no genuine issue for trial.'" Scott, 127 S. Ct. at 1776 (quoting Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp., 475 U.S. 574, 586-87 (1986)). A party is entitled to summary judgment if "the facts and inferences point overwhelmingly in favor of the moving party, such that reasonable people could not arrive at a contrary verdict." Miller v. Kenworth of Dothan, Inc., 277 F.3d 1269, 1275 (11th Cir. 2002) (internal quotations omitted).

C. Analysis

Plaintiffs make four allegations in their Complaint: 1) that during "the month of June 2005 and on or about July 18, 2005 [sic], defendant, or another person at his direction, without a warrant, entered plaintiffs' premises and illegally seized property belonging to plaintiffs" (Compl. at ¶ 5); 2) that Defendant "secured a warrant that misstated information and omitted information vital to the existence of probable cause . . ." (Id. at ¶ 7); 3) that the warrant is so broad so as to constitute an impermissible general warrant (Id. at ¶ 15); and 4) that there "existed a lack of probable cause under the Fourth Amendment, in that . . . the warrant sets forth no criminal activity or violation of O.C.G.A. § 27-3-133 having been committed." (Id. at ¶ 14).

Defendant claims: 1) he was never on Plaintiffs'

property prior to executing the search warrant; 2) he never ordered or knew of any law enforcement officer improperly being on Plaintiffs' property; 3) he did not misstate or omit information vital to the existence of probable cause; 4) the application for the search warrant set forth probable cause and criminal activity; and 5) the warrant was not overly broad. Defendant also states that he is entitled to qualified immunity because, notwithstanding Plaintiffs' allegations, he had arguable probable cause for the warrant. Finally, Defendant argues that the injunctive relief requested by Plaintiffs is not available where a defendant is sued only in his individual capacity.[17]

1. Warrant Application

The Fourth Amendment guarantees "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures." U.S. Const. amend IV. A warrant generally is required to conduct a search of a home. Welsh v. Wisconsin, 466 U.S. 740, 748-49 (1984) ("searches and seizures inside a home without a warrant are presumptively unreasonable"); United States v. Gonzalez, 71 F.3d 819, 825 (11th Cir. 1996). A warrant must be based on probable cause and describe with particularity the place to be searched and the person or things to be seized. U.S. Const. amend IV. "Probable cause is defined in terms of facts and circumstances sufficient to warrant a prudent man in believing that the suspect had committed or was committing an offense." Crosby v. Monroe County, 394 F.3d 1328, 1332 (11th Cir. 2004) (quotations and citations omitted). The existence of probable cause is a question of law when the facts are not in dispute. Marx v. Gumbinner,

905 F.2d 1503, 1505-06 (11th Cir. 1990).

The Court must determine "whether a reasonably well-trained officer . . . would have known that his affidavit failed to establish probable cause and that he should not have applied for the warrant." Malley v. Briggs, 475 U.S. 335, 345 (1986). "In determining whether there has been an unreasonable search and seizure by state officers, a federal court must make an independent inquiry, whether or not there has been such an inquiry by a state court, and irrespective of how any such inquiry may have turned out." Elkins v. United States, 364 U.S. 206, 223-24 (1960).

Police officers naturally are required, when seeking warrants, to make statements that are only "'truthful' in the sense that the information put forth is believed or appropriately accepted by the affiant as true." Holmes v. Kucynda, 321 F.3d 1069, 1083 (11th Cir. 2003). Police officers "may be held liable under 42 U.S.C. § 1983 for submitting an application for an arrest warrant that contains false information." Id.

The law is well-settled that evidence in plain view of an officer who is in a place where he is entitled to be may be seized by the observing officer. This plain view doctrine provides: "An officer may seize evidence that is in plain view despite the failure to obtain a search warrant if two elements are satisfied: (1) lawful access to the object seized, and (2) the incriminating nature of the object seized is immediately apparent." United States v. Hromada, 49 F.3d 685, 690 n.11 (11th Cir. 1995) (citing Horton v. California, 496 U.S. 128, 136-37) (1990); United States v. Smith, 459 F.3d 1276, 1290 (11th Cir. 2006).

Plaintiffs first allege that the warrant was not valid because Defendant either illegally entered and searched Plaintiffs' property, or Defendant knew that other officers had done so prior to his application for the search warrant and yet used this illegally obtained evidence to support the warrant application. Defendant in turn claims that neither he nor any other law enforcement officer ever entered Plaintiffs' property during June and July 2005, prior to the execution of the search warrant and, even if others did, he did not have any knowledge of any law enforcement officer having entered Plaintiffs' backyard prior to July 21, 2005.[18] Defendant further claims that Plaintiffs have not submitted any evidence that Defendant was on Plaintiffs' property or that Defendant intentionally or recklessly included any misrepresentations or omissions in his warrant application.

To support their claim that Seitz either was on Plaintiffs' property or knew that other law enforcement officers had been on Plaintiffs' property, Plaintiffs proffer the affidavit of Lance Fisher.[19] In his affidavit, Fisher claims that on the afternoon of Thursday, July 14, 2005, he drove slowly by Plaintiffs' home, saw that his car was not in the driveway, and noticed there were two men in front of him carrying a metal tub across the street. Fisher Aff. at ¶ 14. He also states that he saw two men "near the back of a white utility vehicle and two men that he nearly stopped for as they crossed the street. The two men in the street were carrying a metal wash tub." Id. at ¶ 15. According to Fisher, the four men were wearing hard hats and tool belts, and they put the metal wash tub in the back of the vehicle, which was parked across the street "from what would be the middle of Plaintiffs' house and Plaintiffs'

neighbor's house. Id. at ¶ 16. Fisher claims unequivocally that the two men carrying the metal tub were Hal Hamrick and Defendant Seitz. Id. at ¶ 19.[20]

Fisher's observations create a genuine material dispute of fact as to whether Defendant either was on Plaintiffs' property prior to applying for and executing the search warrant, or whether Defendant knew that law enforcement officers were improperly on Plaintiffs' property and had improperly searched or obtained evidence prior to obtaining and executing the search warrant. The relevant question then becomes whether the evidence included in the search warrant was the product of independent sources of information, and not information obtained during any allegedly illegal entry. See Murray v. United States, 487 U.S. 533, 541-42 (1988); United States v. Chaves, 169 F.3d 687, 692 (11th Cir. 1999) (where portions of the search warrant affidavit are based on information acquired as a result of an illegal entry, the Court "must look to whether the other information provided in the affidavit is sufficient to support a probable cause finding."). This is a two-pronged inquiry: 1) "whether the expurgated warrant affidavit contains probable cause;" and 2) "whether the information gained through the illegal search influenced or motivated the officers' decision to procure a warrant." United States v. Restrepo, 966 F.2d 964, 971 (5th Cir. 1992); see also Chaves, 169 F.3d at 692-93; United States v. Herrold, 962 F.2d 1131, 1144 (3rd Cir. 1992) (Following Murray, a district court must ask two questions in determining whether a warrant is based on an independent source: "(1) whether a neutral justice would have issued the search warrant even if not presented with information that had been obtained during an unlawful search and (2) whether the first

[illegal] search prompted the officers to obtain the search warrant.").

The information included in the search warrant application is not disputed, and the Court has reviewed the warrant application and accompanying affidavit. Defendant stated in the affidavit that other officers had told him that they had seen–from outside Plaintiffs' fence–stock tanks containing protected turtles and additional stock tanks which appeared suitable for breeding turtles. Defendant also showed to the issuing judge the photographs the agents had taken allegedly from outside of Plaintiffs' property. Ordinarily, "a law-enforcement officer may rely upon information received second-hand from other law-enforcement officers to demonstrate the existence of probable cause." Nnadi v. Richter, 976 F.2d 682, 686 (11th Cir. 1992). See also United States v. Kirk, 781 F.2d 1498, 1505 (11th Cir. 1986) ("It is sufficient if the affidavit recites at the outset, or if it is clear from reading the affidavit as a whole, that it is based in part upon information obtained from other law enforcement officers."); United States v. Hill, 500 F.2d 315, 320 (5th Cir. 1974) (finding that simply because the information, source and reliability of a confidential informant was communicated to the affiant by another officer "is of no decisional moment" and "can be presumed reliable." The fact that an officer who had not made the personal observations "imparted this particular information to the magistrate in no way attenuates its accuracy or the credibility of the informant."); United States v. Hayles, 471 F.2d 788, 793 (5th Cir. 1973)("although the information contained in the affidavit was not based on the personal knowledge of the affiant, it was based on the personal observations of a fellow law enforcement

official engaged in the same investigation and as such could be presumed reliable.").

There is, however, a genuine, material dispute of fact as to what exactly Defendant Seitz knew when applying for the warrant. If in fact Defendant illegally searched Plaintiffs' property prior to applying and obtaining the search warrant, or if he knew that the other officers illegally searched the property, and he then intentionally or recklessly omitted or misrepresented that information, the warrant is invalid. "The Supreme Court has held that the Constitution prohibits an officer from making perjurious or recklessly false statements in support of a warrant." Kelly v. Curtis, 21 F.3d 1544, 1554 (11th Cir. 1994) (citing Franks v. Delaware, 438 U.S. 154, 156, 165-71 (1978)). This rule "does not apply to negligent misrepresentations or omissions." Id. (emphasis in original). Plaintiffs claim that the pictures of the tanks alone would not be sufficient probable cause. Plaintiffs also claim that the officers could not have seen into the tanks, and thus see the turtles which allegedly required a license, without someone entering his property. Indeed, in reviewing the photographs taken of the alligator snapping turtles appear, they may well have been taken on Plaintiff's property. A review of the warrant application demonstrates that there would be no probable cause independent of the information Seitz learned from any alleged illegal entry. Moreover, there is testimony from Fisher that Seitz was present at Plaintiff's home where the evidence on which he relied to seek the warrant was obtained.[21]

2. Qualified Immunity

Defendant next argues he is entitled to summary

judgment on Plaintiffs' federal claims because he is entitled to qualified immunity. "Qualified immunity offers complete protection for government officials sued in their individual capacities if their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known."[22] Wood v. Kesler, 323 F.3d 872, 877 (11th Cir. 2003) (citations and quotations omitted). The process for analyzing a defense of qualified immunity is well established:

> To be eligible for qualified immunity, the official must first establish that he was performing a "discretionary function" at the time the alleged violation of federal law occurred. Once the official has established that he was engaged in a discretionary function, the plaintiff bears the burden of demonstrating that the official is not entitled to qualified immunity. In order to demonstrate that the official is not entitled to qualified immunity, the plaintiff must show two things: (1) that the defendant has committed a constitutional violation and (2) that the constitutional right the defendant violated was "clearly established" at the time he did it.

Crosby, 394 F.3d at 1332. "For purposes of determining qualified immunity, the facts are as alleged and supported by affidavits and deposition testimony, and are taken in the light most favorable to the plaintiff." Bruce v. Beary, 498 F.3d 1232, 1236 n. 2 (11th Cir. 2007); Bishop v. Avera, 177 F.3d 1233, 1235 n.2 (11th Cir. 1999) ("In reviewing a summary judgment motion predicated on qualified immunity, the court must resolve all factual disputes in favor of the

plaintiff.")(citing Johnson v. City of Fort Lauderdale, 126 F.3d 1372, 1378 (11th Cir. 1997)).

"A right is clearly established if, in light of preexisting law, the unlawfulness of the official's conduct is apparent." Cooper v. Dillon, 403 F.3d 1208, 1220 (11th Cir. 2005). This standard does not require that the specific conduct in question was previously found to be unlawful; the state of the law need only give an official "fair warning" that his conduct is unlawful. Id. (citing Hope v. Pelzer, 536 U.S. 730, 741 (2002)). Qualified immunity therefore "ensure[s] that before they are subjected to suit, officers are on notice their conduct is unlawful." Id. "[T]he relevant question on a motion for summary judgment based on a defense of qualified immunity is whether a reasonable official could have believed his or her actions were lawful in light of clearly established law and the information possessed by the official at the time the conduct occurred." Stewart v. Baldwin County Bd. of Educ., 908 F.2d 1499, 1503 (11th Cir.1990).

It is undisputed that Defendant was performing a discretionary function in applying for a search warrant. The burden thus shifts to Plaintiffs to show Defendant is not entitled to qualified immunity. "The relevant, dispositive inquiry in determining whether a right is clearly established is whether it would be clear to a reasonable official that his conduct was unlawful in the situation he confronted." Hyath v. City of Decatur, 2006 WL 825779, at *16 (N.D. Ga. Mar. 28, 2006)(internal citations omitted). "[T]his question boils down to whether the state of the law, at the time of the incident, gave fair warning to the official that his conduct was unlawful." Id.

The Eleventh Circuit has held that "the Constitution prohibits police officers from knowingly making false statements in an arrest affidavit about the probable cause for an arrest." Holmes, 321 F.3d at 1084 (citing Jones v. Cannon, 174 F.3d 1271, 1285 (11th Cir. 1999)); Kelly v. Curtis, 21 F.3d 1544, 1554 (11th Cir. 1994)(stating that "a police officer violates the Constitution if, in order to obtain a warrant, she perjures herself or testifies in reckless disregard of the truth"). The Eleventh Circuit has noted that Franks clearly established, for qualified immunity purposes, that an officer may not make an "affirmative misstatement" in applying for a warrant. O'Ferrell v. United States, 998 F.Supp. 1364, 1371 (M.D.Ala. 1998)(citing Kelly, 21 F.3d at 1555). Qualified immunity "does not offer protection if an official knew or reasonably should have known that the action he took within his sphere of official responsibility would violate the constitutional rights of the plaintiff." Kingsland v. City of Miami, 382 F.3d 1220, 1233 (11th Cir. 2004)(internal quotations omitted); see also Madiwale v. Savaiko, 117 F.3d 1321, 1327 (11th Cir. 1997) (holding that "an officer would not be entitled to qualified immunity when the facts omitted . . . were . . . so clearly material that every reasonable law officer would have know that their omission would lead to a search in violation of federal law.").

"Summary judgment is properly denied if there are genuine issues of material fact as to an asserted qualified immunity defense." Chasse v. McCraney, 174 Fed. App'x 473, 475 (11th Cir. 2006) (citing Herren v. Bowyer, 850 F.2d 1543, 1546-47 (11th Cir. 1988), which denied summary judgment in a 42 U.S.C. § 1983 case because genuine issues of material fact remained).

Plaintiffs' constitutional right to be free from unreasonable search is clearly established. Defendant, as a law-enforcement officer, knew or should have known it was wholly improper to seek a warrant with an affidavit intentionally or recklessly misstating or omitting certain relevant material. Questions of material fact remain as to whether Defendant knew that some of the information he used in applying for the warrant was illegally obtained. See Herren, 850 F.2d at 1546 ("[A] genuine fact issue as to what conduct the defendant engaged in would preclude a grant of summary judgment based upon qualified immunity.").[21] At this point in the litigation, there are genuine disputes of fact as to whether Seitz accompanied Bloxom and Phillips (and possibly Hamrick) on July 14, 2005; whether Seitz carried a metal tub away from Plaintiffs' property on that day, the contents and ownership of the metal tub; whether Bloxom, Phillips, and Hamrick entered Plaintiffs' property in any way and at any point prior to the execution of the search warrant, including whether they touched or removed any of Plaintiffs' property or entered Plaintiffs' property to take any of the photographs Defendant used in applying for the warrant; and whether Seitz knew that any of the evidence he used in applying for the warrant was obtained illegally. Without answers to these critical factual disputes, whether Seitz had qualified immunity cannot be answered and the issue of qualified immunity simply cannot be decided at this stage of the litigation.

3. Injunctive Relief

Plaintiffs seek, in addition to damages, injunctive relief. Defendant claims that, because Plaintiffs have only

sued him in his individual capacity, injunctive relief is not available.

"Qualified immunity does not pertain to claims for injunctive or declaratory relief, because these claims are considered to be official capacity claims against the relevant governmental entity." Edwards v. Wallace Community College, 49 F.3d 1517, 1524 n. 9 (11th Cir. 1995). The Eleventh Amendment allows for injunctive relief against state officials in their official capacity, and damages against state officials in their individual capacity. Wu v. Thomas, 863 F.2d 1543, 1550 (11th Cir. 1989).

It is undisputed that Plaintiffs have only sued Defendant in his individual capacity. Injunctive relief is thus not available.

III. CONCLUSION

For the foregoing reasons,

IT IS HEREBY ORDERED that Defendant's Motion for Summary Judgment [45] is GRANTED IN PART and DENIED IN PART. Defendant's Motion for Summary Judgment is GRANTED with respect to Plaintiffs' request for injunctive relief. Defendant's Motion for Summary Judgment is DENIED in all other respects.

IT IS FURTHER ORDERED that Defendant's Motion for Extension of Time to File Reply Brief in Support of Motion for Summary Judgment [54] is GRANTED.

SO ORDERED this 28th day of January, 2009.

Footnotes

1 The Court notes these disputed facts, once resolved, may lead to the finding that Defendant is entitled to qualified immunity. The Court simply cannot resolve that issue at this stage of the proceedings.

2 The facts are taken from Defendant's Statement of Undisputed Facts ("DSUF")[45-2] and Plaintiffs' Response to Defendant's Statement of Material Facts ("RDSMF")[50]. The Court notes that many of Plaintiffs' responses are improper. They frequently do not contain any citation to evidence, contain improper or incorrect citations to evidence, and include conclusory statements and legal argument. The Court also includes additional facts as found in various exhibits included in the record.

3 In July 2005, Defendant was a corporal with the GDNR [2].

4 The parties dispute whether it is illegal under Georgia law to collect or possess alligator snapping turtles without a special permit or license.

5 In their response, Plaintiffs state that Steven Santhuff was acting as a Cooperating Private Individual ("CPI"). Plaintiffs otherwise admit this statement.

6 Plaintiffs' responses to Defendant's St. of Undisp. Facts on this issue is confusing and contradictory. Santhuff first claims he did not buy the offered additional and illegal protected species [RDSMF at ¶ 22], but later admits that the purchase of the black knob

sawback turtles occurred on September 9, 2004 and was authorized by USFWS [RDSMF at ¶ 24].

7 While Plaintiffs admit this fact, they go on to say that "At the same time, defendant Seitz had knowledge that the agents had illegally trespassed onto the property, in the backyard of the Plaintiffs, and that they had taken Sabine Map Turtles in a metal tub." [RDSMF at ¶ 28].

8 Plaintiffs admit the agents made the statements of their observations to Defendant, but dispute that the agents made the observations from outside of his backyard. Plaintiff claims that the pictures Seitz used to support the warrant could not have been taken from outside the fence as the officers claim. Affidavit of Steven Santhuff at ¶ 8. Plaintiff claims that the pictures taken by the officers on July 14, 2005 show officers poking sticks into a stock tank, and a stick creating recent water motion. Santhuff Dep. at 138:1-25; 139:1-15; 140:1-25. When shown these pictures, Seitz denies knowing how the sticks got into the tank or seeing the water motion. Seitz Dep. at 92:21-25; 93:1-7.

9 The pictures, as viewed by the Court, seem to support Plaintiff's claim they were taken on Plaintiff's property and not from a position outside of it.

10 Photographs taken that day show the officers wearing hard hats and fluorescent vests, but no tool belts are visible.

11 Plaintiffs' responses for these two statements do not constitute proper denials. First, Plaintiffs state that Defendant did not check to determine if Diana Santhuff had a license. That is not what is stated in Defendant's

St. of Undisp. Facts. Second, Plaintiffs deny that Defendant was told that Santhuff did not have a license. This denial does not reference any evidence of the record and is thus improper. Defendant's statement is further supported by the evidence included in the record.

12 A notice of objection is the proper method for challenging the admissibility of evidence in an affidavit, rather than filing a motion to strike under Rule 12 of the Federal Rules of Civil Procedure. See Morgan v. Sears, Roebuck & Co., 700 F. Supp. 1574, 1576 (N.D.Ga. 1988).

13 In his affidavit, Seitz that he did not accompany Phillips and Bloxom to Plaintiffs' home on July 14, 2005. Seitz Aff. at ¶ 20. In his deposition testimony, Seitz also states that three officers went out to Plaintiffs' residence on July 14, 2005–Bloxom, Phillips, and Hamrick. Seitz Dep. at 45:8-25. Agent Bloxom only mentioned Phillips accompanying him that day. Mot. to Suppress Hearing of April 30, 2007 at 181:16-25.

14 Defendant has not presented any evidentiary support for his conclusory assertion that Fisher was told who Seitz was in the pictures shown to him after Santhuff's deposition. Defendant also does not present any evidence that Fisher was ever specifically asked during the criminal proceeding if he could identify Seitz or someone else near Plaintiffs' home.

15 Defendant's allegation that Fisher's affidavit is in "direct conflict with contemporaneous time records and photographs" is also without merit. A review of the photographs and time records does not disprove

Fisher's statements. For example, the fact that the time records maintained by Seitz's office may indicate that he was not working on the afternoon of July 14, 2005 does not mean Seitz was not working off-duty that day. The photographs also do not indicate whether Seitz was present or not at Plaintiffs' residence.

16 The Court does not address the admissibility of the affidavit of Diana Mendez Santhuff because the content of it is not necessary to decide the motion for summary judgment.

17.The Court concludes there are factual disputes that must be resolved regarding how information was obtained to support the warrant and whether the manner in which the warrant was obtained violated Plaintiff's constitutional rights. If so, the execution of the warrant may have constituted a further constitutional violation. If, however, the evidence on which the warrant was based was constitutionally obtained, the Defendant may well be entitled to qualified immunity and the scope of the warrant is likely constitutionally valid. These latter issues may well be questions of law for the Court to determine after the factual disputes are resolved.

18 The evidence in the record disputing Defendant's claim is the affidavit of Lance Fisher, in which Fisher states he saw Seitz carrying a metal wash tub away from Plaintiffs' property on July 14, 2005. Plaintiffs also point to the circumstantial evidence that someone had moved objects on their property, and the fact that the photographs could not have been taken from outside the fence, which may lend credibility to the testimony that Seitz was present on or knew others had

entered Plaintiff's property.

19The validity of Fisher's affidavit was determined in Section A. Notice of Objections, supra.

20 Defendant claims this testimony is untrue. If it is, there is a remedy for providing false testimony in a civil proceeding. There simply is an insufficient basis to reject Fisher's testimony out of hand as urged by Defendant.

21 Although Seitz's warrant affidavit included information prior to July 14, 2005 (including the video and ad posted on the internet), Seitz did not apply for the warrant until July 18, 2005, four days after the photographs and observations were made by the other officers. As already noted, whether Seitz was or was not with the other officers on July 14 is in dispute.

22.Plaintiff does not question whether Defendant was acting within his discretionary authority when applying for the warrant. An official performs a discretionary function when his acts "but for the alleged constitutional infirmity, would have fallen with his legitimate job description," and the acts were done "through means that were within his power to utilize." Holloman v. Harland, 370 F.3d 1252, 1266 (11th Cir. 2004). Applying for a warrant clearly falls within the official responsibilities of a police officer and thus within his discretionary duties. See Evans v. City of Plant City, Fla., 2007 WL 2916454, at *3 (M.D. Fla. Oct. 5, 2007) citing Malley v. Briggs, 475 U.S. 335, 342-43 (1986). The Court finds that Defendant was acting within his discretionary authority.

23 Defendant argues that the appropriate test in determining qualified immunity when an officer intentionally makes false statements in a warrant affidavit is arguable probable cause. While several Eleventh Circuit and other circuit cases have not conducted an arguable probable cause analysis under such facts, see, e.g., Holmes, 321 F.3d at 1083-84, Madiwale, 117 F.3d at 1326, Defendant has not demonstrated arguable probable cause exists in this case. "Qualified immunity applies when there was arguable probable cause for an arrest even if actual probable cause did not exist. Arguable probable cause exists if, under all of the facts and circumstances, an officer reasonably could–not necessarily would–have believed that probable cause was present." Crosby, 394 F.3d at 1332-33 (quotations and citations omitted); Williamson v. Mills, 65 F.3d 155, 158 (11th Cir. 1995). "Whether a particular set of facts gives rise to probable cause or arguable probable cause to justify an arrest for a particular crime depends, of course, on the elements of the crime." Id. at 1333.

Defendant simply cannot demonstrate that arguable probable cause existed for purposes of summary judgment. As noted above, the important and operative facts here are at least disputed. There is a genuine dispute of material fact as to whether Defendant falsified portions of the affidavit, recklessly disregarded the truth, or otherwise should have known that there was a lack of probable cause or that certain officers illegally searched Plaintiffs' property. There is a dispute of fact as to whether Defendant would have even applied for the warrant without this information. As stated in Skop v. City of Atlanta:

> [Q]ualified immunity protects the police from such suits, but only up to the line defined by the arguable probable cause standard–whether reasonable officers in the same circumstances and possessing the same knowledge as the Defendant[ ] could have believed that probable cause existed to arrest. Where, as here, the resolution of disputed critical facts determines on which side of this line the officer's conduct fell, summary judgment is inappropriate.

485 F.3d 1130, 1144 (11th Cir. 2007) citing Lee v. Ferraro, 284 F.3d 1188, 1195 (11th Cir. 2002). The Court cannot find that arguable probable cause existed, and Defendant is not entitled to qualified immunity as a matter of law on Plaintiffs' claims.

Filed 8/31/2010
Nos. 09-12821 & 09-13714 Non-Argument Calendar
UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

STEVEN D. SANTHUFF, DIANA MENDEZ SANTHUFF, Plaintiffs-Appellants,

versus

STEVE SEITZ, in his individual capacity, Defendant-Appellee.

On Appeal from the United States District Court for the Northern District of Georgia.

ON PETITION(S) FOR REHEARING AND PETITION(S) FOR REHEARING EN BANC

Before: EDMONDSON, BIRCH and CARNES, Circuit Judges.

PER CURIAM:

The Petition(s) for Rehearing are DENIED and no Judge in regular active service on the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure), the Petition(s) for Rehearing En Banc are DENIED.

122	Total
0-6 5-12 12-16 18-24	=4 =13 =45 =27

7/10/2005	12-18 18-24	6 1	Met w/complaintant ref. Fishing w/o permission on Noontootia Creek; Patrolled Lake Blue Ridge w/ 112, Checked a camp on the lake (Campbell Camp area) w/12, USFS
7/11/2005	12-18 18-24		10-7 GA Comp Day
7/12/2005			10-7 Regular Day Off
7/13/2005	12-18 18-24	2.5 5.5	Undercover Detail in Atlanta w/USFWS ref. Case #03-0506-25; Set Hunter Ed dates in Fannin County
7/14/2005	6-12 12-18	4 5	10-7 Holiday (Independence Day)
7/15/2005	6-12 12-18	4 5	Undercover detail in Atlanta w/USFWS to obtain evidence for a search warrant ref. Case # 03-0508-25
7/16/2005	6-12 12-18 18-24	2 4.5 2.5	Worked on writing search warrant ref. Case # 03-0508-25; Patrolled Toccoa River, Shallow Bridge, etc. Met w/116, 7106, USPFS at GSP Blue Ridge; Foot patrol an area near

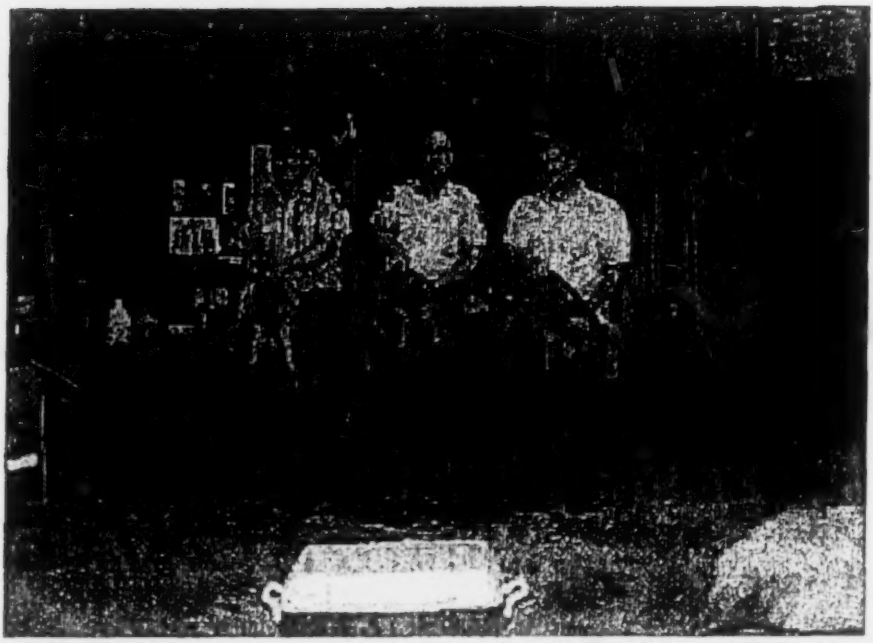
			Rich Mtn. WMA w/116, 133; Assisted USFS w/dead body that was found on USFS property near Cohutta WMA w/ 116, 133

ERRATA SHEET

I, LANCE E. FISHER, the undersigned, do hereby certify that I have read the foreging deposition and that to the best of my knowledge said deposition is true and correct with the exception of the following corrections listed below.

Page	Line	Correction	Reason
5	10	Larry to Lance	wrong name
27	5	Cushman to Cushma	wrong name
32	10/11	Referring to the bucket in the picture pointing during the deposition	Bucket
37	10	Large Rubbermaid tub set in ground	Bucket
43	3	Exhibit # 3	bucket
39	3	I recall map turtles only, not specific type Confusion between June & July	
41	16	Absolutely, yeah refers to exhibit # 3	
41	16	I'm not sure refers to paragraph 19 in Exhibit 4	
41	14	The bucket picture was on CD with agents & turtles. The photo she asked me about she didn't show me	
42	11/13	The only printed photo was the one with the bucket not of Sietz. Sietz was on	

		CD/computer slide show & on search warrant video that I saw after Steve Santhuff's deposition	
41	16/14	In exhibit #4 paragraph 19 my original writing was changed in wording end sentence structure, but not changed in meaning. Changed from slides on CD to photos. The photos of the agents including Sietz holding an Alligator snapping turtle on the left was not shown to me in my deposition, but is now attached to this page as C1. The affidavit is correct in meaning.	
41	21/22	Don't recall seeing any printed photos of Sietz, but the affidavit is correct, he was on the CD's from discovery and on the video of the search	



This photo was printed today April 2, 2009 and is the picture that Steve Santhuff shown to me. I recognize Steve Sietz on the left with a hat holding an Alligator snapping turtle. This was the "slide on CD" or "photo" referred to in my affidavit.

Sown to and subscribed before me this the 3rd day of April 2009.

s/Lance E. Fisher

s/-
Notary Public